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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES.

No. ~~499.~~ 1824

SAMUEL S. THORP ET AL., APPELLANTS,

vs.

SAMUEL S. HAMMOND ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 27, 1869.

12.

SUPREME COURT OF THE UNITED STATES.

No. 409.

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vs.

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APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Libel	1	1
Stipulation for libellants' costs	11	4
Order on return of process	13	4
Order on return of process, &c	15	5
Answer	19	6
Hearing of cause	33	9
Testimony of John E. Mailler	37	11
W. H. Mailler	38	12
M. Rogers	39	12
Henry T. Wood	40	13
J. Falkenberg	41	13
Edward Soper	42	14
George Collins	42	14
H. Ketchum	43	14
M. J. Cole	44	14
R. Brewster	44	15
T. Jackson	45	15
S. Mott	45	15
G. W. Brewster	46	15
B. T. Jayne	46	15
G. C. Hawkins	46	15
Henry Korner	46	15
William Tanner	47	16
Captain Smith	48	16
Captain Frederick Merwin	49	16
Thomas B. Hawkins	49	16
C. H. Brewster	50	17
E. M. Smith	50	17
John Prim	50	17
Accounts of schooner	55	18

	Original.	Prin.
Accounts of schooner	57	19
Deposition of Frederick Ducker	59	20
Exhibit A	77	29
Deposition of David D. P. Van Name	83	30
Frederick Davy	101	37
M. Rogers	103	38
H. Gillette	113	42
William Liscum	119	45
Charles Price	125	46
C. L. Gillette	131	49
S. S. Hammond	139	52
E. S. Pomeroy	155	58
H. Soper	155	58
E. Almark	157	59
R. A. Wood	158	59
F. Davy	159	60
J. B. Crammer	165	62
Final decree	171	64
Notice of appeal	173	65
Petition of appeal	175	65
Bond on appeal	179	66
Hearing of cause in circuit court	181	67
Final decree in circuit court	183	68
Petition of appeal to United States Supreme Court	185	68
Bond on appeal to United States Supreme Court	189	69
Citation on appeal to United States Supreme Court	193	70
Clerk's certificate	195	71

1 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Friday, the 26th day of June, in the year of our Lord one thousand eight hundred and sixty-three:

Present, the Honorable William D. Shipman, district judge.

SAMUEL S. THORP ET AL.
vs.
SAMUEL S. HAMMOND ET AL. } 16, 36.

1860, MARCH 5.—The libellants file their libel in the words and figures following, to wit:

To the Honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The libel and complaint of Samuel S. Thorp, Isaac O. Thorpe, James W. Olsin, Charles Harriman, Josiah M. Reeves, William J. Reeves, Edward Reeves, John T. Chambers, Elias H. Chambers, George W. Copperthwaite, Christian D. Emson, & Frederick Davy against Samuel S. Hammond, Edmund Hammond, Jacob Smith, Charles Gillett, Brewster Ferry, Charles Price, Alfred Price, Hiram Sell, all residents of said district, in a cause of collision, civil & maritime, alleges as follows:

First. That this is a cause founded upon collision, civil and maritime.

2 Second. That, at the times hereinafter mentioned, libellants were, and now are, residents of said district, and were the sole owners of the schooner called the "Brothers," belonging to the port of New York.

Third. That the said schooner, the "Brothers," was, on the forenoon of the 12th day of February, 1860, run into and sunk by the schooner R. H. Huntley, which was at all times herein mentioned owned by and in possession of respondents. And the libellants are entitled to the damages by them sustained in the premises, which amount to the sum of twelve thousand eight hundred and eighty dollars, or thereabouts.

Fourth. That the facts of the said collision were as follows, viz: That the said schooner, the "Brothers," sailed from the port of Alexandria, D. C., on the 2d day of February, 1860, bound on a voyage to the port of New York, under the command of Frederick Davey, the master thereof, deeply laden with a cargo of 440 tons of coal; that, about the hour of 8 o'clock in the morning of said 12th day of February, 1860, said schooner, the "Brothers," had arrived within about 18 miles of the Highlands of Nevesink, on her said voyage to the port of New York, and was running up along the New Jersey shore, close-hauled on a course a little to the east of north, and but a short distance from the shore, and making about eight knots an hour; that the schooner R. H. Huntley, which was a smaller vessel, and about

3 as heavily laden, was at the same time bound to the port of New York, and was running in the same general direction, but a very little further from shore, and a little in advance of said schooner, the "Brothers;" that a third schooner, called the "William Capes," heavily laden with a cargo of wood, was at the same time bound to the port of New York, and was running in the same general direction, and about a quarter of a mile ahead of the Huntley; that said schooners were all three sailing in the general direction and relation last described, and in close proximity, from about 8 o'clock in the morning of said 12th day

of February, 1860, until about 9 o'clock of the same morning, the wind being during all that time northwest, and blowing fresh and increasing; that, about the time last named, the wind shifted more to the north, and being about north-northwest, and increasing in force, both said schooners, the Brothers and Huntley, clewed down their topsails, and, falling off a little from the land, sailed on an off-share tack a little to the east of their former course, and on which they both proceeded for about two miles, when the Huntley came about and stood in for land, whereupon said schooner Brothers, in order to avoid collision
4 with her, came about also, and stood in for land, the Huntley being at the time about two hundred yards distant, and passing the Brothers to the windward; that when within about a quarter of a mile of the shore the Huntley and the Brothers went about to stand off shore, the Huntley lowering her mainsail at the same time to reef it; that the Brothers did not lower her mainsail, but stood on her off-shore tack under three full sails, and passed the Huntley to the leward, and keeping up close to the wind; that said schooner, the Brothers, proceeded on said off-shore tack until she had reached the heavy sea, which was running about two miles from land, and until she had beat out her tack, and was further from shore than when she came about to stand in at the end of her last off-shore tack, when she met the said schooner "William Capes," which had just come about to stand in shore, standing in, when, to avoid a collision with her, as also the sea and wind at that distance off shore, the Brothers also came about to stand in; that, at the time of putting down the helm on board said schooner, the "Brothers," to come about, as last mentioned, said schooner,
5 the Huntley, was about a point on the weather quarter of the Brothers, and about six hundred yards astern of her; that immediately after the Brothers had come about, & before she had gathered sufficient headway to be manageable, said schooner, the Huntley, while going at about the rate of five knots an hour, carelessly, negligently, and wrongfully ran into said schooner Brothers, striking her on the leeboard quarter about six feet forward of the cabin-house, so soon and with such force that she sunk in about twenty minutes; that immediately after she was struck, the Brothers, as soon as she could gather headway, came about and stood off shore for the purpose of throwing the injured side of the vessel out of the water, with a view to examine the leak and stopping it, if possible; that every effort was made by those in charge of the Brothers to stop the leak without avail, when, a signal of distress having been hoisted, a steamer that had answered it made fast to the Brothers, and every possible effort was made by those in charge of the steamer, as also those in charge of the Brothers, to run the latter vessel ashore, without avail, and she sank in about twenty minutes from the time of the collision in deep water, and became and is a total loss, with her said cargo, tackle, apparel, and furni-
6 ture; that, at the time, the said schooner, the "Brothers," was a tight, staunch, and strong vessel, well fitted, tackled, apparelled, officered, and manned, and had a proper lookout, and was heavily laden, and that nothing was done by her to cause the said collision, and that nothing was omitted which could have been done by her to avoid the same; that, during all the time said schooner, the Huntley, was beating out her long off-shore tack, being that at which said collision occurred, all hands on board of her were occupied in reefing the mainsail, and no one was on the lookout on board of her during the twenty minutes intermediate the lowering her mainsail and her running into the Brothers, and that the course of the Huntley was not altered

with reference to avoiding the Brothers until she was directly upon her, and it was too late to keep off or come about; that at the time the Brothers came about, on her last or in-shore tack, the wind had increased to a reef breeze, and was flawy, and the sea was rough at that distance from the shore, which was from two to two and a half miles; that the said collision was caused by the negligence of those on board and
7 in charge of the said Huntley in running directly towards the "Brothers," instead of coming about or keeping off to avoid her, and in not seeing the Brothers long enough before the collision to allow her to come about or keep off, and in not having sufficient men on board to manage the vessel safely and prudently, and in not having a proper lookout; that, from the time the Huntley was within about 600 yards of the Brothers, all on board the latter vessel hallooed with all their might to those on board the Huntley to keep off, but could not make themselves heard or seen, and were not heard or seen by them until it was too late to come about or keep off.

Fifth. That said vessel, the Brothers, at the time she was sunk and lost as hereinbefore stated, was, with her tackle, apparel, and furniture, worth the sum of $12,000.

Sixth. That, since such collision and loss, these libellants have applied to such owners of the schooner Huntley for settlement and payment of the damages suffered by them, but they wholly refuse to pay the same, or any part thereof, and the same remains wholly unpaid to these libellants by or from defendants.

8 Seventh. That, when said schooner Brothers was run into as aforesaid, she had on board 440 tons of coal, which these libellants, as common-carriers, were transporting from Alexandria aforesaid to New York for the American Coal Company, under an agreement with such company, whereby, on the delivery of such coal at the port of New York, these libellants were to have and receive the sum of $880, as for the freight of said coal, and that said coal was sunk with said vessel, the Brothers, without the fault of libellants or their servants, and became and was totally lost, whereby libellants were prevented from delivering the same in pursuance of their said agreement with said company, or otherwise, and were deprived of their right of recovering the freight thereof from said company.

Eighth. That all and singular the premises are true and within the admiralty and maritime jurisdiction of this honorable court.

Wherefore these libellants pray that process, in due form of law, according to the course of this honorable court in causes of ad-
9 miralty and maritime jurisdiction, may issue against the said respondents, owners as aforesaid, and that they may be cited and compelled to answer the matters aforesaid on oath, & that this honorable court would be pleased to decree the payment of the damages and freight as aforesaid, with interest and costs, and that libellants may have such other and further relief as in law and equity they may be entitled to receive.

FREDERICK DAVEY.

Sworn to this 1st day of March, 1860, before me.

W'M D. JONES,
Notary Public.

BENEDICT & THORN, *Proct. Lib.*
A. BENEDICT, *Advocate.*

(Endorsed:) 16, 36. U. S. dist. c't. Samuel S. Thorp & o'rs ag'st

Samuel S. Hammond & others. Libel. Benedict & Thorn, pr's lib'ts. Filed March 5, 1860.

10

11 *Stipulations for libellant's costs, entered into pursuant to the rules and practice of this court.—Filed the 5th day of March*, 1860.

District court of the United States for the southern district of New York.

Whereas a libel was filed in this court on the fifth day of March, in the year of our Lord one thousand eight hundred and sixty, by Samuel S. Thorp et al. against Samuel S. Hammond et al., for the reasons and causes in the said libel mentioned, and praying that process in due form of law might issue against the said respondents; and the said libellants and Abner Benedict, surety, parties hereto, hereby consenting and agreeing that, in case of default or contumacy on the part of the libellants or their surety, execution may be issued against their goods, chattels, and lands for the sum of one hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and each of them is, bound in the sum of one hundred dollars, conditioned that the libellants above named shall appear and answer to the cause, and to interrogatories, and shall pay all such costs as shall be awarded against them by this court, or, in case of appeal, by the appellate court.

A. BENEDICT.
FREDERICK DAVEY.

Taken and acknowledged this 5th day of March, 1860, before me.
GEO. W. MORTON.
U. S. Commissioner.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Abner Benedict, party to the above stipulation, being duly sworn, doth depose and say that he resides in the city of New York, and that he is worth the sum of two hundred dollars over and above all his just debts and liabilities.

A. BENEDICT.

Sworn to this 5th day of March, 1860, before me.
GEO. W. MORTON,
U. S. Commissioner.

Recorded the fifth day of March, 1860.
GEO. F. BETTS, *Clerk.*

12

13 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Tuesday, the 20th day of March, in the year of our Lord one thousand eight hundred and sixty:

Present, the Honorable Samuel R. Betts, district judge.

SAMUEL S. THORP ET AL.
vs } 16, 36.
SAMUEL S. HAMMOND ET AL.

The marshal having returned on the citation issued in the above-

entitled cause "not found," on motion of the proctors for libellants, ordered that an alias citation issue herein, returnable the 27th instant.

14 (Indorsed:) Vol. 16, No. 36. United States district court for the southern district of New York. Samuel S. Thorp et al. vs. Samuel S. Hammond et al. Order on return of process for alias citation. Benedict & Thorn, proctors for lib'l'ts. Filed the 20th day of March, 1860.

15 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Tuesday, the 27th day of March, in the year of our Lord one thousand eight hundred and sixty:

Present, the Honorable Samuel R. Betts, district judge.

SAMUEL S. THORP ET AL.
vs.
SAMUEL S. HAMMOND ET AL. } 16, 36.

The marshal having returned the alias citation issued in the above-entitled cause:

"Personally served on Jacob Smith, within named, at Sayville, Long Island, & personally served on Brewster Terry & Charles Price, at Patchogue, Long Island, on the 23d day of March, 1860, on Charles Gillett, by leaving copy with Jacob Smith for him:"

Mr. R. H. Huntley appears for all parties served, who have two weeks to answer.

On motion of proctors for libellants, ordered pluries citation as to others.

16 (Indorsed:) Vol. 16, No. 36. United States district court for the southern district of New York. Samuel S. Thorp et al. vs. Samuel S. Hammond et al. Order on return of process for time to answer & for pluries citation. Benedict & Thorn, proctors for lib'l'ts; R. H. Huntley for cl'm'nts, & resp'ts. Filed the 27th day of March, 1860.

17 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Tuesday, the 10th day of April, in the year of our Lord one thousand eight hundred and sixty:

Present, the Honorable Samuel R. Betts, district judge.

SAMUEL S. HAMMOND ET AL.
ads.
SAMUEL S. THORP ET AL. } 16, 36.

THE SAME
ads.
THE AMERICAN COAL COMPANY. } 16, 38.

Mr. Huntley appears for all the respondents, & has three weeks further time to file & perfect answers in the above causes.

18 (Indorsed:) Vol. 16, No. 36, 38. United States district court for the southern district of New York. Samuel S. Hammond et

al. ads. Samuel S. Thorp et al. The same ads. The American Coal Company. Order for further time to answer. R. H. Huntley, proctor for resp'd's. Filed the 10th day of April, 1860.

To the Honorable Samuel R. Betts, judge of the district court of the United States for the southern district of New York:

The answer of Samuel S. Hammond, Edmund Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, and Hiram Sell, the respondents to the libel and complaint of Samuel S. Thorp, Isaac O. Thorp, James W. Alsen, Charles Harriman, Josiah M. Reeve, John F. Chambers, Elias H. Chambers, George W. Copperthwaite, Christian D. Everson, and Frederick Davey, libellants.

And now come the said respondents, and, for answer to the libel of the libellants against them, do allege and propound as follows:

First. That these respondents are ignorant of the matter contained in the second article of said libel, and therefore they deny the same, and leave the libellants to such proof in that behalf as they may be advised.

Second. That, at the time set forth in the third article of said libel, these respondents were, and now are, the general owners of the said schooner "R. H. Huntley;" and the proportion of said vessel owned by each of these respondents is hereinafter correctly set forth, as is also the value of said vessel, and the amount of freight she was employed in earn-
20 ing at the time of said collision. These respondents are ignorant of the amount of damage sustained by the libellants, as in said third article stated; but they deny that said damage was as much or as great as is therein alleged, and ask that the amount of said damages may be established in this honorable court by proper proof in that behalf made.

Third. That the matters contained in the fourth article of said libel are in a great part falsely alleged, and that the true statement of the manner of said collision is as follows, viz:

That the said schooner R. H. Huntley, being in good order, and well and sufficiently manned and equipped, was, on the morning of the said 12th day of February, 1860, on her way from the port of Baltimore to the port of New York, deeply laden with a cargo of coal, and was proceeding along the New Jersey shore with the wind northwest, and blowing fresh and increasing, and holding about the same relation as to position and distance to said schooner "Brothers" and "William Capes" as is set forth in said libel; that the said three vessels were, until between the hours of 9 and 10 o'clock, running up along the New Jersey shore close-hauled on a course a little to the east of north, and but a short distance from the shore, and making about 8 knots an hour; that,
21 at about the hour last named, the wind shifted more to the north, and, being about north-northwest and increasing in force, both said schooners, the "Brothers" and the Huntley," clewed down their topsails, and, falling off a little from the land, continued on a little to the east of their former course for the distance of about five miles, when, being about two and a half miles from the shore, both vessels almost simultaneously came about and stood in for the land; that, at the time of going about, said vessels were at a distance of at least five hundred yards from each other, and the Huntley was so far to the windward of the Brothers as to preclude all danger or apprehension of a collision; that the two vessels, after going about, stood in for the land about twenty minutes, and until they were within about an eighth of a mile

from the shore, when they again tacked to stand up along the beach, the Huntley being still about five hundred yards to the windward, and while going in stays lowered her mainsail to reef it; that the Brothers continued standing on up the beach under three full sails, heading about two points off the land and passing to the leeward of the Huntley, which latter vessel was falling off from the wind and was making about five knots an hour; that the Brothers continued on her course about fifteen minutes, at which time she had gone about two miles from the
22 place of the last tacking, and was from three-quarters of a mile to a mile from the shore, and was from 250 to 300 yards ahead of the Huntley and about two points off her lee bow, when she (the Brothers) suddenly and without cause and negligently and wrongfully tacked to stand in shore, being, when fairly about and with her sails filled away, (but before she had gathered headway,) at a distance of only about 50 yards from the Huntley and directly under the leebow of the latter vessel, and in such a position as made it entirely impossible for the Huntley to avoid a collision with her; that, by reason of the Huntley's mainsail being on deck and she under headsails only, she could not go in stays, but, upon discovery that the Brothers had gone about, she put her helm hard up to keep off, and was in the act of keeping away when she struck the Brothers on the larboard quarter near the cabin-house, badly damaging the Brothers, which soon after sunk, and carrying away the cut-water and head-gear of the Huntley; that when the Brothers tacked, immediately proceeding said collision, she was not at a greater distance than one mile from the shore in smooth water, and had not beaten out her tack, nor any considerable portion thereof, and that the real cause of her then tacking was a desire not to lose
23 ground by keeping away and passing under the stern of the "Capes," which vessel was then standing across the bow of the Brothers on her in-shore tack, and in which direction she had been standing for more than five minutes; that, by a slight variation in the helm of the Brothers, she would have easily passed under the stern of the "Capes," and thus no collision could have happened; that, when the Brothers tacked to stand across the Huntley's bow, she knew full well that the Huntley's crew were engaged in reefing her mainsail, by reason of which she was in a crippled and disabled condition; that, in the utter disregard of the rights and condition of the Huntley, she placed herself in such a position as to render a collision inevitable; that, at the time of said collision, the Huntley was in every respect well manned with a good crew and a full compliment of [of] men, all of whom, including the master, were at the time on deck and engaged in the navigation and management of said schooner; that, immediately proceeding the tacking of the Brothers, she was noticed on board the Huntley to be standing on her long tack up the beach with plenty of sea room and with every appearance of standing on for several miles; that, at the precise moment of the Brothers' tacking, all hands on board the Huntley, except
24 the master, who was at the wheel, were engaged in reefing the mainsail, as, owing to the flawy and squally state of the wind, all hands were required for that purpose; that it was easy for those in charge of the Brothers to discover the condition of things on board the Huntley; and that it was entirely by their own negligence and carelessness in going about, in utter disregard of the Huntley and her condition, that the collision occurred.

Fourth. That these respondents are ignorant of the matters set forth in the fifth and seventh articles of said libel, and therefore deny the same, and demand that proof thereof be in this honorable court. But

these respondents aver that said freight was not lost to the libellants by reason of any fault, carelessness, or wrong on the part of these respondents, or of those having in charge and navigating the said schooner R. H. Huntley.

Fifth. And, by reason of the premises, these respondents say that they are not liable to the libellants for the said sum of $880 freight, then being earned by said schooner Brothers, nor for any portion thereof, nor for the said $12,000, the alleged value of said Brothers, nor for any portion thereof.

25 Sixth. That the American Coal Company of Alleghany County, Maryland, has filed a libel and commenced a suit against these respondents to recover the sum of $1,760, the alleged value of the cargo of coal on board the said Brothers at the time of said collision, which coal said American Coal Company claim to have owned, and said suit is now pending in this honorable court.

Seventh. That, immediately proceeding said collision, the value of the said schooner R. H. Huntley did not exceed the sum of $5,000, and was about that sum, and the value of her freight then pending was $424, and that she was damaged by said collision, by carrying away her cut-water and head-gear, in the sum of $350.

Eighth. That the proportion of the amount or value of the interests of each of the respondents respectively as general owners in said schooner R. H. Huntley was and is as follows, viz: Samuel S. Hammond, $\frac{3}{16}$; Edmund Hammond, $\frac{3}{16}$; Jacob Smith, $\frac{2}{16}$; Charles Gillett, $\frac{2}{16}$; Brewster Terry, $\frac{1}{16}$; Charles Price, $\frac{2}{16}$; Alfred Price, $\frac{1}{16}$; and Hiram Sell, $\frac{2}{16}$.

Ninth. But these respondents say that although they were and are the general owners of said schooner R. H. Huntley, as in the
26 last proceeding article of this answer stated, yet, at the time of said collision and long previous thereto, said schooner was commanded, sailed, and exclusively managed by the respondent Samuel S. Hammond only, and under and by virtue of an agreement made and entered into between him and the other respondents, the general owners of said vessel, with said Hammond, whereby it was agreed to charter, let, and hire said vessel to the said Hammond, to be by him managed, commanded, sailed, and employed on his own account, without the management, control, or restraint of the other respondents and owners; that, by reason of said agreement and charter, the respondent Samuel S. Hammond took and had possession, and had the entire control and management, of said schooner as charterer on and for his own account, by means of which he became and was the owner pro hac vice of said schooner, and was such owner at the time of said collision, and was and is only and alone responsible for the consequences thereof.

Tenth. And, by reason of the premises, these respondents deny that, by reason of the matters and things alleged in said libel, the said libellants have sustained damage to the amount of $12,880, or any damage or loss for which these respondents are liable.

27 Wherefore these respondents pray that said libel may be dismissed, and for their costs

SAMUEL S. HAMMOND.

R. H. HUNTLEY, *Proctor & Advocate.*

Sworn to this 8th day of May, 1860, before me.

JOSEPH BRIDGHAM,
U. S. Com'r.

(Endorsed:) 16, 36. United States district court. Samuel S. Thorp

et al. against Samuel S. Hammond et al. Answer. R. H. Huntley, proctor for resp'd's. Filed 8th May, 1860.

28

29 At a stated term of the district court of the United States of America for the southern district of New York, held in the United States court-rooms in the city of New York, on Thursday, the tenth day of May, in the year of our Lord one thousand eight hundred and sixty:
Present, the Honorable Samuel R. Betts, district judge.

SAMUEL S. THORP ET AL.
vs.
SAMUEL S. HAMMOND ET AL. } 16, 36.

Andrew Kohler, notary public, brings into court the depositions on the part of the libellants taken before him in the above-entitled cause. Ordered, that said depositions be opened and filed.

30 (Indorsed:) Vol. 16, No. 36. United States district court for the southern district of New York. Samuel S. Thorp et al. vs. Samuel S. Hammond et al. Order to open and file depositions for lib'l'ts. Benedict & Thorn, proctors for lib'l'ts. Filed the 10th day of May, 1860.

31 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Monday, the 22d day of July, in the year of our Lord one thousand eight hundred and sixty-one:
Present, the Honorable Samuel R. Betts, district judge.

SAMUEL S. THORP ET AL.
vs.
SAMUEL S. HAMMOND ET AL. } 16, 36.

The clerk having this day received the deposition taken on the part of libellants (before Andrew Kohler, notary public) in the above-entitled cause, ordered, that said deposition be opened and filed.

32 (Indorsed:) Vol. 16, No. 36. United States district court for the southern district of New York. Samuel S. Thorp et al vs. Samuel S. Hammond et al. Order to open & file dep'n (for lib'ts.) Benedict & Thorn, proctors for lib'ts. Filed the 22d day of July, 1861.

33 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Thursday, the nineteenth day of September, in the year of our Lord one thousand eight hundred and sixty-one:
Present, the Honorable William D. Shipman, district judge.

SAMUEL S. HAMMOND ET ALS.
ads.
SAMUEL S. THORP ET ALS. } 16, 36.

This cause being called in its order on the calendar, ordered hearing. Pleadings read.

Evidence on a primary question as to charter-party:

John E. Mailler.....Sworn.
William H. Mailler..... "

Evidence for libellants:

Milford Rogers, sworn as to the absence of Edward Decker, whose deposition is offered in evidence.
Edward Soper, to the same effect.
Deposition of Edward Decker.....Read.
" " Milford Rogers..... "
" " Daniel P. Van Name..... "
Cause adjourned.

FRIDAY, 20*th September*.—Continued.

Evidence for libellants:

34 Henry T. Wood.....Sworn.
Job Falkenburgh..... "
Edward Soper..... "
George Collins..... "

Evidence for respondents:

Henry Ketcham.....Sworn.
Richard Beaston..... "
Winant J. Cole..... "
Francis Jackson..... "

Evidence for respondents, cont'd:

Sylvanus Mott.....Sworn.
George W. Brewster..... "
Benjamin F. Jayne..... "
George E. Hawkins..... "
Cause adj'd to 11 a. m., to-morrow.

SATURDAY, 21*st September*.—Continued.

Evidence for respondents:

Henry Konner.....Sworn.
William Farmer..... "
Samuel M. Smith..... "
Frederick Morris..... "
Thomas B. Hawkins..... "
Charles H. Brewster..... "
Edward N. Smith..... "
Cause adjourned over to the 8th day of October next.

35 At a stated term of [of] the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Wednesday, the 9th day of October, in the year of our Lord one thousand eight hundred and sixty-one:

Present, the Honorable William D. Shipman, district judge.

SAMUEL S. THORP ET AL.
vs.
SAMUEL S. HAMMOND ET AL. } 16, 36.

This cause being adjourned on the 21st September last to this day, &

now coming on for further hearing, the libellants proceed with their testimony:

Evidence for libellants:

John Payne ..... Sworn.

Cause adjourned till to-morrow at 11 a. m.

WEDNESDAY, *November 26th*, 1862.—Present, Hon. W. D. Shipman, district judge. Ordered, that this cause be set down for hearing, on the first Monday in January next.

TUESDAY, *January 6th*, 1863.—This cause, being left unfinished from October 9th, 1861, is now brought on for further hearing and the
36 respondents proceed with their testimony:

Evidence for respondents:

Deposition of Henry Gillett ..... Read.
" " William Liscomb ..... "
" " Charles Price ..... "
" " Charles Z. Gillett ..... "
" " Samuel S. Hammond ..... "
Eugene H. Pomeroy ..... Sworn.

Evidence for respondents, continued:

Exhibit "A" ..... Read.

Evidence for libellants:

Hezekiah Soper ..... Sworn.
Job Falkenburgh ..... "
Elijah R. Aumack ..... "
Richard A. Wood ..... "
Frederick Davey ..... "

Cause adjourned to 11 a. m., to-morrow.

WEDNESDAY, *7th January*, 1863.—Continued.

Evidence for libellants:

Deposition of Joseph B. Cramer ..... Read.

Mr. E. C. Benedict argues for libellants.
Mr. Huntley argues for respondents.
Mr. Benedict submits brief.
C. A. V.

37 U. S. district court.

THORP & OTHERS
vs.
HAMMOND & OTHERS. } Evidence on trial.

Sch'r R. H. Huntley, sailing vessel.
" The Brothers " "
Collision, Feb. 12, 1860, outside Highlands off Jersey shore.
Resp'd's pr. suggests trying question of chartering the Huntley first.

JOHN E. MAILLER:

Clerk for Mailler, Lord & Querian. The acc'ts of the sch'r R. H. H., in '59 & '60, made up in our office. I made them up; know Capt. Hammond & the Huntley; know upon what terms Capt. H. sailed that vessel.

I settled his acc'ts with his owners. He sailed her on shares. I make up his acc'ts. I made them up under the instructions of Capt. H. (Acc'ts produced. Objected to. Admitted.) From voyage No. 50, Sept. 11, '57, down to v'y'ge 78, May 16.

This coll'n occurred on the 74 voyage, dated Jan'y 30, '60. The next v'y'ge dated Feb., '61.

(Witness reads the acc't of the voyage on which the coll'n occurred.

38 This acc't offered to show that Capt. H. was charterer of the sch'r. Nos. 73 & 74 to be copied out and handed in with exhibits.)

Know that capt. paid crew, victualling. Alfred Price lives on Long Island, Patchogue; J. Smith, at Sayville, L. I.; C. Gillett, same; H. Sell, in Brooklyn; E. & S. Hammond, Pachogue. Our firm loaded her in our line.

I made up the ac. as the friend of capt. I have seen the other owners; think all. I pay to some of them the dividends of voyage; to Gillette, Sell, & the capt.'s brother.

W'm H. Mailler:

Shipping merchants & agents of vessels; know the Huntley, owners and master; was sailed on shares. Capt. paid manning & victualling, & ½ port charges, & rec'd ½ gross earnings. These were the terms. Capt. had entire control of vessel; could go where he pleased. I know of no restriction. He controlled matters on board, and, of course, controlled the business of the vessel.

Cross:

I know this from the way the ac. was made up; from Capt. H. & the owners; know all the owners; can't say all stated this, but Smith, Gillette, Sell; latter paid acc't on order of capt. for his part of earnings; have been on board; never heard of owners directing the course
39 of vessel, so far as I know. Capt. had no other compensation than his share. Masters generally select their own crews; frequently select their own stores; this is usual; crew in this case paid by capt.; we did not; seven men in all, including capt. The bills on this ac. would be paid by the vessel except ½ port charges. (The preliminary questions deferred.)

Deposition of Edward Decker. Obj. as taken before notary. Obj. as it not appearing where Decker now is.

Milford Rogers:

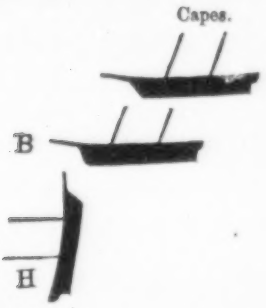
Know Decker; heard he was gone to sea; saw him last week, about Thursday; he is mate of the Ira Bliss, Capt. Ed. Soper. In conversation with owner of Bliss, I learned that Decker had sailed in her.

(Fol. 59. Deposition of Decker admitted. Objections marked 1 & 2, respondents' counsel offers to withdraw now at reading of deposition. Obj. by lib'ts.)

(Fol. 101. Deposition of Milford Rogers. Fol. 83. Deposition of Capt. David P. Van Name, now dec'd. Suit in which it was taken was discontinued. Obj. overruled & dep'n admitted.)

40 HENRY T. WOOD:

Familar with shore along where coll'n took place.



The H. should have ported her helm and gone astern, as her mainsail was down, and she could not have gone about in time to have avoided the collision. I assume the H. to be 5 to 600 yards astern of the B. at time latter went about. If I assume the Capes to have been 200 yards from B. at same time, the B. could not have cleared the Capes; if but 200 yards, by going astern of her, you could not by main sheet run and done it; 700 *neer* 250 yds. not enough. If the main sheet was cut instantly, she might have done it at the distance of 300, if cut main sheet. If Capes 3 m's. on her tack, could not the B. have cleared her?—She could. But would she be getting towards N. Y. and making her trip quick?—I did not understand you, she could not in 3 m's; possibly she might in five if main sheet cut, but not otherwise; they would come together; the B. & Capes should be 800 yards apart.

41 If the Capes went about on the line 300 yards ahead in five minutes they would have collided or struck her boom—boom or quarter.

I should have been afraid to have attempted to port the wheel. She might have passed her, but doubtful.

7 or 8 knots the speed, she would begin to feel her helm 300 yards distant. My vessel would not clear a rock 300 yards aport at this speed. She should be 9 or 10 lengths to clear the rock, 200 feet to the leeward. If a vessel was ahead of my vessel, on about the same line, and near me, reefing, I would look out for her and not run into her. I understood the coll'n to have been about 10 miles from S. Hook, say 30 m's from L. I.

(The H. was reefing at the time the coll'n. See pleadings Mr. H.)

The wheel of H. would be 2 spokes to leeward to hold her up to the wind, with mainsail & jib up only.

JOB FALKENBURG:

Vessel ag't; have save sailed vessel; have seen Capt. Hammond of the H.; heard a conversation with him & Capt. D., of the Brothers, about the coll'n at J'y City about the middle of February, 1860.

(The admission of Capt. H. objected to as not competent in the case at all, but at most only as against himself. Admitted, subject to proper application.)

42 Capt. H. said he was reefing, and did not see the Brothers.

Capt. EDWARD SOPER:

Coasting capt. 13 years along Jersey shore. (Models placed.) If Capes ahead 200 yards, a little further off shore, the Capes then goes about. The B. should go about. The Huntley should have kept off, supposing her to be 600 yards at time B. commenced to tack. If 300 yards only between the Brothers & H., and latter reefing, and on same tack as B., still H. should have kept off, and Br's should have gone about; same duty if Capes had been on her tack 5 min's. We are not bound to look out for a stern vessel, even if she was reefing; not bound to look after the stern vessel.

Capt. GEO. COLLINS:

Had charge of vessel 23 years. Assuming the H. at 600 yards from B., the B. 200 yards from Capes; now if C. goes about it is the duty of B. to go about, or keep off & clear; can do as he thinks proper. If sailing for S. Hook, he would go about & tack in shore; but, if he wanted to go further off shore, should go astern of the Capes, in order to make a safe thing of it. The B. should tack in shore if H., 600 yards off, can't go about and stand in shore. She should keep away and pass to stern of her.

(It is conceeded that H. could not go about and stand in shore.)

43 Q. Suppose the H. ahead of the B. & tacked & reefed, and the B. passed her 100 yards to leeward, she was reefing, and you saw it, the B. then passes 600 yards ahead, would you still go about and cross her bow?

A. I should if I thought it would be to my advantage in making good time; should rely on the vessel astern having a lookout and avoiding me, as it would be her duty to do.

Q. Suppose you knew she had no lookout, what would you do?

A. To keep clear of her, if possible; when wind is N. W., a bad jumping sea, 2 miles from shore.

Libt's rest.

Evidence for respondents.

HENRY KETCHUM:

Was originally an owner in H. Built her for Hammond to command. The terms were, he was to sail her on shares, as he had the Hiram Gerard. He was to victual & man, pay ½ port charges, and divide nett proceeds after deducting ½ port charges. He victualled & manned & had ½ nett proceeds of voyage. Before he was to have ½, port charges were deducted; then he took ½ the balance.

The capt. had absolute control of her; owners gave no directions whatever. I was owner 4 years. Have not owned from 3–4 years.

44 Owned ½. Never interfered, or knew any owner to do so; but they could have terminated the contract at any time, as I understood. It was not limited as to time. It was not terminated, that I am aware of. I live in Pachogue part of the time, and part in New York. She run from N. Y. south, not further than Cape Henry. This is the way such vessels are sailed. I owned in five, and all sailed same way except one.

MYROM J. COLE:

Seafaring man in coasting vessels 36 years, and know their customs. No custom to have man at lookout in daytime. When reefing always consider I must keep out of way of vessel near me reefing.

Such vessel is in partly crippled state, and the middle vessel should pass to stern of one ahead; that is a general custom. Reefing vessel not bound to look out for vessels in her vicinity. Not a very heavy sea, with wind N. N. W.

Mr. B. supposes the Capes to be to leeward 200 yards, and 200 ahead of her, and to have gone about. Then should go under stern also; reefing vessel is crippled.

Capt. RICHARD BREWSTER:

Coast capt. 19 years previous to '42; all time coaster. Know of no settled custom, except as controlled by surrounding circum-
45 stances. Can only give my experience.
(Obj. overruled.)

With me, and among masters with whom I have sailed, it is settled custom to give reefing vessel the way and avoid her under all circumstances. Assuming distances 200 and 600 yards, and Capes 5 min's on her tack, the B. should have gone astern of the C., the H. being reefing. If a vessel passes to leeward of me, and goes by me, she has no right to cross my bow except at her peril. Not customary to have a lookout while reefing under the circumstances of these vessels.

Capt. FRANCIS JACKSON:

Master of coasters 8 years. Reefing vessel must be yielded to by those under full sail. Not customary to have lookout in daytime when reefing. If Capes 200 yards ahead, with heavy breeze, sea smooths wind N. N. W., several miles out, on other points the witness agree, substantially with others.

Capt. SYLVANUS MOTT:

At sea 25 years; coasting mostly. If B. 2 points on lee bow of H., and 600 yards off when the B. tacked, (and B. had remained station-
ary,) she would have fallen off so as to have passed under B.'s
46 stern. The B. ought to have kept on the long lag. Rest agrees substantially with the foregoing. With wind like this, not rough enough 6 miles from shore to prevent vessels working well with reefed sails, it grows rougher as you go off shore. The B. sunk 1½ to 2 miles from shore. A vessel reefing not obliged to look out.

Capt. GEO. W. BREWSTER:

16 years master. Sailed from Sandy Hook 10 or 11 o'clock. Saw the H., and saw the B. sink. Passed a mile from shore. The sunken vessel 80 rods off shore from us. Water smooth, or nearly so. Reefing vessel has right of way. No lookout reefing in daytime. The B. should have gone under stern of either the C. or H. It is his peril if he crosses his bow.

BENJAMIN F. JAYNE:

Coaster 6 years. Agrees with last witness.

GEORGE E. HAWKINS:

Master 3 years. At sea 10. As to reefing custom and lookout agrees with last witness.

Capt. HENRY KORNER:

47 In '60 was capt. of towboat Maryland. On morning of the 12th was near Highlands. Saw them first after the coll'n, and when the H. was getting clear of the B. were about ¾ mile from Jersey

shore. Water pretty smooth there. More sea 2 miles off shore. Not enough to prevent vessels from going along or working well. Saw B.'s masts after she sunk. B. sunk 1½ or 1⅓ miles from shore.

X:

Was lying still off Highlands looking for a tow; 7 miles from Sandy Hook; about as far from S. Inlet; been there since daylight; had not seen them before; 1 or 2 miles from me; might have been east from me; think they were. Saw the H. come out of the B.'s mainsail. The H. set her colors for a boat. The B. tacked and came in towards shore, then stood off. Jacob Bell tow-boat took hold and made toward shore, but she soon sunk. B. stood on her outward tack 20 or 25 min's, on her tack in shore 5 minutes. The tow-boat had hold of her 30 or 40 minutes. Coll'n took place ¼ to ½ mile further off shore than I was, and 1 to 1½ miles to northward. I laid off S. Inlet ½ mile off shore. I saw the jib boom through the B.'s mainsail.

WILLIAM FARMER:

Engineer on J. Bell in Feb., 1860. On morning of coll'n we
48 were laying right abreast the big light, a little above the Highlands. The Bell went for Bro's. First saw her after she had set her colors. She was standing off shore then, 2 miles from us; I should think about E. from us. We were ¾ mile off shore; the Bro's 1½ mile off shore when we first saw her. I did not then see the H. We were 20 or 25 min's in getting to B. She was coming up in wind heading about N., when we fastened to her; towed her 25 or 30 minutes in shore, directly towards the beach; pretty rough off where we took hold of her, 3 to 3½ miles from shore; quite a little sea; a vessel could work in it without trouble; considerable smoother 2 miles off; smoother still one mile.

X:

My place with the engine. Our boat makes 12 miles; Maryland about same thing as we. We could make 4 miles per hour with tow; did not cast off before she sunk; towed her with long hawser.

Capt. SMITH:

Capt. 21 years; knew the H. Used to carry 6, all told, in vessel of her size; that a fair crew. The B. should have gone under the stern of C. 5 min's time enough to see what C. was doing; reefing vessel has a right of way; reefing vessel no need of lookout.

49 Capt. FREDERICK MERWIN:

Master and mate 4 years. If reefing, I am crippled; other vessels must look out; no custom to have lookout on reefing vessels. (The custom not claimed as local.) H. reefing 600 yards, 200 y'ds B., 1 or 2 points off lee bow of H., Capes 5 m. on tack, B. should go astern. B. might have gone about if she could have cleared the H.

THOMAS B. HAWKINS:

Master 25 years in coasting; H. centre board; 6 a fair compliment o men. Vessels under full sail must give way to vessels reefing; this a custom of sea. Not customary to keep lookout on fore-and-aft schooners when reefing; we call all hands, cook and all. Wind N. by W., H goes about ⅛ mile from shore reefing. B. goes about ¼ mile from shore; B. passes H. 100 yards to leeward; 600 yards; 200 yards. B. 1 or 2 points

off lee bow of H.; 7 or 8 knots. H. under foresail and jib, 5 minutes, B. should have gone under stern of Capes. B. would fall off on putting her wheel hard up 1½ minutes, I should think; think she would clear the vessel 200 yards ahead easily. A vessel the size of B. would shoot to windward 20 rods in going in stays after the luffs and before she fills away. A vessel under foresail and jib, at rate of 4 or 5 knots, would
50 fall off 1½ points in 600 yards; would not hit a vessel 600 yards off; would clear the B., if latter remained still. I left off going steadily to sea 12 or 13 years ago; have been every year since; have a yacht now.

CHARLES H. BREWSTER:

At sea 17 years; master 5, off and on. Know the H.; 6 a fair crew for her. Saw the B. sink. We were just going past S. Hook in Ja's M. Holmes. Sunk ½ or ¾ miles from shore, should think, but did not take particular notice. Have not seen her masts since. We passed inside her ¼ mile from shore. Should consider water smooth.

EDMUND N. SMITH:

Been master 14 years between N. Y. and Charleston. Not customary to have lookout on fore-and-afters while reefing; about 6 fair compliment of men. On same assumptions of the other questions the B. should have gone under stern of C.; no right to cross the bow of the H. Duty of the two vessels ahead of H. to have kept on long leg while H was reefing; but at any rate the B. should have cleared her.

Evidence for libellants.

JOHN PRIN:

Mate of the H. Was on board at the time.

51 Q. At time of tacking to go in shore the last time proceeding the coll'n how far were you from shore?

A. 3 miles.

Q. Was that the first in-shore tack you had made that morning?

A. Yes.

Q. Previous to first in-shore tack how had you been standing?

A. Up the beach, and [and] point and half off the land.

Q. How long?

A. Can't tell; had been ½ point off land. Wind had been baffling, and we had been on that tack all the morning.

Q. On first shore tack how far did you stand in?

A. To within ⅛ mile of beach. As soon as we went about in shore we lowered mainsail & went to reefing. Stood on that tack off shore 10 or 15 min's, all the while reefing; then we had the collision. We were not quite through reefing when coll'n occurred. It would have taken us 5 min's more to finish. Takes 15 or 20 m's to reef. Sail dry that morning, and in good condition for handling. The B. about 400 yards on our lee quarter, when we lowered our mainsail; all hands employed at reefing; capt. at wheel. The B. I saw on the off-shore tack, and just before we struck her. When I last saw her she was two points on our lee bow and 150 feet from us. She was standing in shore. On discovering her
52 I sung to capt. to put the wheel hard up. I heard other halloo, but supposed it came from the other vessel. Capt. put his wheel hard up, as I told him. I saw the C. ¼ mile off shore from us, 1 point on our lee bow. She was about ¼ mile from us. This was at the time of coll'n.

Saw C. at time I told capt. to put wheel up. At time of coll'n we were ½ to ¾ mile from shore, heading about 3 points off land. The B might be heading 2 p'ts off. Our mainsail being down would make 1 point difference.

Q. When you saw Capes at time of coll'n could B., if standing on off-shore tack, have cleared her by going under her stern?

A. She could. The B. appeared to work as well as other vessels of her class; was a centre board, and they work quicker than others. In going 200 yards at rate of 7 or 8 knots, with wind as it was then, the B. might fall off 2 or 2½ points, with helm hard up. In going about as wind was then she ought to have shot 2 lengths to windward, 210 to 220 feet. If B. 600 yards ahead of H., one p't on her lee bow, and H. standing on her course, we should not come within 150 yards of her; if 2 p'ts off her lee bow, and as above, we should come within 60 yards of her, perhaps, but not hit. Water was smooth; had 6 on board, all told; sufficient; no custom to have lookout reefing; reefing vessel has
53 right of way, so far as I know. Know Capt. Wood, who testified in this cause; was with him in schooner Alex. Law; had no lookout when reefing. When we first went about to stand in shore we were 300 or 400 yards to windward of B. When we went about in shore to stand off, the B. was also about 300 or 400 yards to leeward of us. B. sunk in neighbourhood of 1 mile from beach.

X:

Have seen her masts since, as I sailed by place where she sunk; was with Capt. Wood one trip only, 5 or 6 years ago, to Va., for load of wood; before mast; remember something said between me and mate at time of reefing on Capt. W.'s vessel; remember all were engaged reefing, except capt. We reefed the H. at time of coll'n because it was blowing heavy, wind N. N. W., and the further you got off shore the rougher it would get; had been blowing an hour; began moderate, and continued harder and harder all the time; saw the B. all the morning; had been ¼ to ½ mile apart since 7 or 8 o'clock; did not see the B. when she was in stays, just before the coll'n; first saw her after she had gone about; she was 150 feet from us, as I have stated; don't think B. was going ahead at all at the time; she was falling off, I think; the H. minds her helm quick; think the B. a good sailor; think she worked that morning as well as the H.; don't know that we hailed the B. at the time of accident;
54 heard some one sing out; can't tell if from our vessel or the B.; can't say what was said; didn't sound anything like "hard up;" one of our men was leeward of boom, and the other to windward; the Huntley obeyed helm, and fell off pretty fast, when the capt. put it up; don't know if capt. of H. could see B. while we were reefing; the men at windward of boom could not; am 25; been to sea 12 y'rs; officer 4 or 5, off and on.

(Endorsed:) Thorp et al. vs. Hammond et al. Minutes of evidence.

55 VOYAGE 73.—(W. D. S.)

Sch'r R. H. Huntley, in ac. with S. Hammond.

CR.

1859.		
Dec. 12.	By am't fr't to Baltimore.....	259 69
" " "	from do. home.....	659 92
		944 61

DR.

Fr't on B. L., 25c.; towing, $2	2 25	
Horse hire, $5 25; advertising, $2	7 25	
Commission this voyage, M., L. & Q. & R. & L.	46 30	
Towing, $2; port tonnage, 3 60	5 60	
Towing, $2; exchange, 45c	2 45	
Towing in New Y. this voyage	15	
Harbor-master, $5; advertising, $5	10	
Discharging grain	21 15	
Extra labor, 23 99; entering & clearing, $1	24 99	
		134 99
		809 62
Capt., ½ sailing		404 81

Vessel's charges.

Main boom, 25 56; wharfage, $2	27 56	
Sail-maker's bill, mainsail	66 77	
Wharfage, $7; twine, 25c	7 25	
Stove pipe, 75c; 1 block, 50c	1 25	
S. W. Carpenter, 3 60	3 60	
Iklot's ship chandlery	32 42	
		138 85
Nett earnings		$265 96

56

Nett earnings		265 96
Alfred Price, for 1/16 nett earnings	16 62	
J. Smith, " 2/16 " "	33 24	
C. Gillett, " 2/16 " "	33 24	
H. Sell, " 2/16 " "	33 25	
C. Price, " 3/16 " "	49 87	
E. Hammond, " 3/16 " "	49 87	
S. Hammond, " 3/16 " "	49 87	
		265 96

The above is a true copy.

J. E. MAILLER, *Clerk.*

(Endorsed:) U. S. district court. Samuel S. Thorp & others against Samuel S. Hammond & others. Accounts of sch'r R. H. Huntley, showing how she was sailed.

This was received in evidence on the 1st or 2d day of the trial.

R. H. H.

57

VOYAGE 74.—(W. D. S.)

Sch'r R. H. Huntley, in ac. with S. Hammond.

CR.

1860.		
Jan'y 30. By am't fr't to Baltimore		464 19
" " " from do. home		424
		888 19

DR.

Fr't on B. L., 25c; advertising, $2 00	2 25		
Commission out & home, R. & L.	22 20		
Port tonnage, $3 68; thurse line, 3	6 68		
Overcharge on fr't on wood	27 19		
1 box soap short-delivered, 2 55; towing, $5, $5	12 55		
Comm'n on fr't out & home, M., L., & Q.	21 60		
Advertising, $5; harbor-master, $5	10		
Extra labor, $33; entering & clearing, $1	34		
Cooperage on cargo, 25c.; trimming coal, $10 60	10 85		
Pilot license, $12 08; discharging coal, $26 50	38 58		
		185	90
		702	29
Capt's ½ sailing		351	15
		351	14

Vessel's charges.

Wharfage, $3; 7 44	10 44		
Steamer Maryland, towing from Sandy Hook.	200		
Carpenters' bill, $67; sail-maker's bill, 8 22	75 22		
Blacksmith's bill	14 95		
Sh. joiner's bill	2 08		
Coopering water casks	1 44		
58 1 doz. brooms, 1 75.; 1 shovel, 75c.; 1 block, 50c.	3 00		
1 hook & thimble, 55c.; sh. chandlery, 10 19	10 74		
Carving head, $3; blacksmith's bill, 10 54	13 46		
		331	51
Nett earnings		$19	63
Alfred Price, for $\frac{1}{16}$ nett earnings		1	23
J. Smith, " $\frac{2}{16}$ " "		2	45
C. Gillett, " $\frac{2}{16}$ " "		2	45
H. Sell, " $\frac{2}{16}$ " "		2	46
C. Price, " $\frac{3}{16}$ " "		3	68
E. Hammond, " $\frac{3}{16}$ " "		3	68
S. Hammond, " $\frac{3}{16}$ " "		3	68
		19	63

The above is a true copy.

J. E. MAILLER, *Clerk.*

(Endorsed:) U. S. district court. Samuel S. Thorp & others against Samuel S. Hammond and others. Accounts of the schooner R. H. Huntley on two voyages.

59 UNITED STATES OF AMERICA,
SOUTHERN DISTICT OF NEW YORK,
City, County, and State of New York, ss:

On this thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty, before me, Andrew Kohler, a notary public in

and for the State of New York, by letters-patent under the great seal of said State, duly commissioned and sworn, dwelling in the city of New York, personally appeared at my office, No. 27 Wall street, in said city, in the southern district of New York, Edward Decker, a witness on the part of the libellants in a certain civil cause of admiralty and maratime jurisdiction now depending and undetermined in the district court of the United States for the southern district of New York, wherein Samuel S. Thorp & others are libellants against Samuel S. Hammond and others, owners of the schooner "R. H. Huntley," respondents.

And the said Edward Decker, having been by me first cautioned and sworn to testify the whole truth, did thereupon depose and say:

1st. Am thirty-six years old; am a sea-faring man; have been a sea-faring man nineteen years; have generally sailed between the port of New York and Savannah, and other ports along the coast.

2nd ques. Were you engaged on shipboard in February last?

60 Ans. Yes, sir.

3d ques. On what vessel, and in what capacity?

Ans. The schooner William Capes, and was mate of her.

4th ques. Did you witness a collision on the 12th day of February last?

Ans. Yes, sir.

5 ques. Between what vessels and where?

Ans. Between the schooner "The Brothers" and "R. H. Huntley." It was about 5 miles south of Sandy Hook.

6th ques. Describe the collision.

Ans. I saw the schooner "The Brothers" tack in shore, and the R. H. Huntley ran foul just abaft the main wheel; that is all that.

7th ques. What was the course of the "Huntley" immediately proceeding the collision?

Ans. She was heading about northeast by north.

8th ques. About what sail was she under?

Ans. Foresail and jib.

9th ques. Under what sail was the "Brothers?"

Ans. Three sails.

10th ques. How long before the collision was the "Brothers" sailing under the lee-shore tack?

Ans. Three minutes.

11th ques. At the time of the collision how was the Capes sailing with referrence to the "Brothers?"

Ans. Parallel.

12th ques. How far apart?

Ans. About 200 yards apart.

61 13th ques. How far were their courses perpendicularly apart?

Ans. About fifty yards.

14 ques. Where was the "Capes" at the time when the "Brothers" went about?

Ans. About two hundred yards east of the "Brothers."

15th ques. Which of the two vessels went about first?

Ans. The "Capes."

16th ques. What would have been the result had the "Brothers" kept on her course instead of going about?

(Objected to by resp't att'y.)

Ans. Probably a collision between the "Brothers" and the Capes.

17th ques. What was the position of the "Huntley" in reference to the Brothers previous to the collision?

Ans. She was south of her, heading at right angles.

18th ques. Before the "Brothers" went about, what was the position of the "Huntley?"

Ans. Parallel, and a little in shore, about six hundred yards behind her.

19th ques. After the Brothers went about to stand in, how far apart was the "Huntley" and the "Brothers?"

Ans. I should judge about six hundred yards.

20th ques. How far from the Jersey shore was the "Brothers" at the time of the collision?

Ans. About two miles.

21st ques. How long had the three vessels you have named been sailing in proximity?

Ans. About five hours.

62 22d ques. What had been the general course of the three vessels?

Ans. They were in for the port of New York along the Jersey coast.

23d ques. How long had they been tacking prior to the collision?

Ans. About two hours.

24th ques. How far from the Jersey shore had their longest tack taken?

Ans. I should judge about two miles.

25th ques. What was the direction and the force of the wind at the time of the collision?

Ans. North-northwest, and it was a reef breeze.

26th ques. How were the three vessels, loaded or light?

Ans. Loaded.

27th ques. Previous to the collision, could you see the decks of the Huntley?

Ans. No, sir.

28th ques. Did you see anybody on board the Huntley?

Ans. No, sir.

29 ques. If there had been any persons forward on board the "Huntley" could you have seen them?

(Objected to by resp'd's' att'y.)

Ans. I think I could.

30th ques. Did you look to see?

(Objected to by resp't att'y.)

Ans. Yes, sir.

31st ques. What happened after the collision?

63 Ans. The R. H. Huntley lowered her foresail and jib and backed clear of the "Brothers." The Brothers went on in shore and tacked again to the northward. The R. H. Huntley run to the southward and took a steamboat. The "Brothers," she stood to the north and also took a steamboat, and sunk while in tow.

22d ques. Immediately proceeding the collision what would have been the result, with reference to avoiding the "Brothers," of porting the helm of the "Huntley?"

(Objected to by resp'ts' att'y.)

Ans. She would have cleared the "Brothers."

33d ques. How much would the helm have required to be ported to have cleared the "Brothers?"

(Objected to by resp'ts' att'y.)

Ans. I should think a half a point.

34th ques. What would have been the result in reference to the two vessels, the "Brothers" and the "Capes," if, after the "Capes" went about, the Brothers had kept on instead of going about?

(Objected to by resp'ts' att'y.)

Ans. Probably a collision between them.

35th ques. Are you acquainted with the rules of navigation prevailing among the coasters?

Ans. I presume I am.

36 ques. Previous to the collision what would have been the proper manœuvre on board the "Huntley" in reference to avoiding the collision with the Brothers?

(Objected to by resp'ts' att'y.)

Ans. To have ported their helm.

64 37th ques. On the last off-shore tack of the "Huntley," and while your attention was directed to her, was her course changed?

Ans. Not that I could see.

Being cross-examined on the part of the respondents, he says:

38th ques. How long have you been mate of a vessel?

Ans. About nine years.

Examination closed for this day. Adjourned, by consent of both parties, till to-morrow, the first day of May, at 3 o'clock p. m.

MAY FIRST, 1860.—The cross-examination of the deponent, Edward Decker, was further adjourned, by consent, till Thursday, the third day of May, at three o'clock p. m.

MAY 3D, 1860.—The cross-examination of deponent further adjourned, by consent, till Saturday, May 5th, at 3 p. m.

MAY 5TH, 1860.—The cross-examination of the deponent, Edward Decker, being resumed by the respondents' attorney, he says:

39th ques. How long had you been mate of the "Capes" at the time you speak of the collision?

Ans. Twelve months.

40th ques. How long have you known Capt. Davey?

Ans. About two years intimately. I know the "Brothers"

65 that morning. Had known her ever since he had been in her; since Capt. Davy had been in her. I reside on Staten Island.

41st ques. At what hour on the morning of the collision did you first see the "Brothers?"

Ans. I saw her at daybreak, as soon as it was light to see her.

42d ques. How, with reference to your vessel, did she at that time bear from you?

Ans. Right astern; about two miles distant.

43d ques. How far distant were you then from Sandy Hook?

Ans. I believe, as near as I can recollect, about twenty miles. I forget exactly where we were.

44th ques. How far distant were you from the shore?

Ans. About two hundred yards.

45th ques. How far distant was the Brothers from the shore?

Ans. I should judge a mile.

46th ques. What direction, by compass, were you then heading?

Ans. North by east.

47th ques. Was the Brothers heading in the same direction?

Ans. She appeared to be heading in more towards the shore.

48th ques. At that time what was the direction of the wind by compass?

Ans. I believe it was west-northwest.

49th ques. When did you first see the Huntley?

66 Ans. At daybreak; the same time that I did the Brothers.

50th ques. What was her position?

Ans. Close under our lee; I should suppose two hundred yards from us.

51st ques. Who took charge of the deck; did the captain or the mate's watch immediately after 12 o'clock that morning?

Ans. The mate's watch. I can't be certain, but I believe it was my watch.

52d ques. Which watch had charge of the deck at daybreak, at the time you saw the "Brothers" and "Huntley?"

Ans. The captain's watch; that will answer the other question.

53d ques. At what time did the mate's watch go below?

Ans. At 4 o'clock.

54th ques. Had you seen the Huntley and Brothers at that time?

Ans. Not to know them.

55th ques. At what time did you go below?

Ans. I did not go below after twelve o'clock at night.

56th ques. How happened you remained on deck after your watch was out?

Ans. I was in the habit of not calling the captain up in the morning watch on account of his being a sick man. After daylight the captain came on deck.

57th ques. Were you at that time close-hauled on the wind?

Ans. I don't recollect, but I believe we had a little sheet started.

67 58th ques. How long did the three vessels observe the position you have stated they were in?

Ans. The R. H. Huntley stayed so until about nine or ten o'clock, the schooner Brothers gradually coming up with her.

59th ques. How was that position changed between nine and ten o'clock?

Ans. By the Capes reefing her mainsail.

60th ques. What change of position was effected by this?

Ans. The R. H. Huntley & Brothers both passed us.

61st ques. On which side of you did they pass?

Ans. Both to the leeward.

62d ques. How far distant from you?

Ans. I don't recollect just how far. I was busy reefing the mainsail.

63d ques. At what hour did you reef your mainsail?

Ans. Between nine and ten o'clock, as near as I can recollect.

64th ques. Who had your helm at this time?

Ans. Captain Van Name. Either the second mate or one of the men took the helm after we got through the reefing.

65th ques. Which passed you first, the Brothers or the Huntley?

Ans. The Huntley.

66th ques. How far distant from the Brothers was the Huntley when she passed you?

Ans. I do not recollect. They were not far apart, because they both passed us while we were reefing.

67th ques. How long were you engaged in reefing the mainsail?

Ans. About half an hour.

68 ques. How many men did you have in reefing it?

68 Ans. Five, including myself. It required as many men to do that work.

69th ques. How many men did you have on board?

Ans. Seven, all told.

70th ques. At the time of your reefing where was the seventh man?

Ans. On the lookout.

71st ques. Who was he?

Ans. The steward.

72d ques. Where was he stationed?

Ans. On the wood, just abaft the foremast. We had on a deck load of wood.

73d ques. Who stationed him there?

Ans. I did.

74th ques. Was it customary for you to station the steward on the lookout?

Ans. No, sir.

75th ques. What was the tonnage of your vessel?

Ans. One hundred and ninety-seven tons, and would carry two hundred and eighty tons of coal.

76th ques. On what part of the mainsail was you engaged in reefing?

Ans. I was all over, from one end to the other.

77th ques. After the Brothers & Huntley passed you did you repass them?

Ans. Yes, sir. I can't tell how soon. I have forgot.

78 ques. In what direction were they from you when you repassed them?

Ans. I think we passed to leeward of them, but won't be certain; can't say.

69 79 ques. How long before the collision did you repass them?

Ans. I should suppose from a quarter to half an hour; 'twas but a little while.

80th ques. On what tack were you standing when you repassed them?

Ans. We were heading northeast by north, with the wind north-northwest.

81st ques. On what part of the deck were you when you repassed them?

Ans. At the wheel; and I continued there until the collision.

82d ques. When you repassed them, which was ahead, the Brothers or the Huntley?

Ans. The Huntley; I can't say how far, but a little ahead, and a little to the windward, and both standing on the same tack with us.

83d ques. How far from the shore was the Huntley when you repassed her?

Ans. I don't know.

84th ques. How far from the shore were you?

Ans. I cannot tell that either.

85 ques. After you repassed the two vessels, how long did they stand on before they tacked?

A. I don't know, but I think the Capes passed the Huntley while the Huntley was reefing the mainsail.

86th ques. Where were you with reference to the two vessels at the time they tacked to stand in shore, as you have stated?

(Objected to by att'y for libellants.)

70 Ans. We were south of them.

87th ques. Ahead or astern of them?

Ans. Astern of them.

88th ques. How far?
Ans. I do not know.
89th ques. Why do you not know?
Ans. Because I have forgotten.
90th ques. How far from the shore were they when they tacked to stand in?
Ans. I do not recollect.
91st ques. Did you notice at the time how far from the shore were they when they tacked?
Ans. I can't say that I did in particular.
92d ques. How long did they stand in shore?
Ans. I can't recollect.
93d ques. Did you see them when they next went about?
Ans. Yes, sir.
94th ques. How far were they then from the shore?
Ans. I can't tell exactly how far, but as close as judgment would let them go for vessels beating up.
95th ques. Was that the time the Huntley lowered her mainsail to reef?
Ans. I believe she lowered her mainsail when she went about in shore.
96th ques. What makes you believe so?
Ans. Because I think so. I saw her lower her mainsail.
97th ques. When she lowered her mainsail how far distant and in what direction was the Brothers from her?
71 Ans. The Brothers was south of her, and they were close together; I can't tell how many yards apart, because I have forgotten.
98th ques. Were they at this time at the windward or leeward of the Capes?
Ans. Windward. The Brothers was astern of the Huntley. I can't tell which was to the windward.
99th ques. When the two vessels filled away, which was to the windward?
Ans. I don't know.
100th ques. After that, did you see either of the vessels pass the other?
Ans. I saw the Brothers pass the Huntley under her lee.
101st ques. How far to the leeward of the Huntley did she pass?
Ans. I do not recollect. She was close under the Huntley's lee.
102d ques. How long after the Huntley went about did the Brothers pass her?
Ans. Within a few minutes.
103d ques. How long after the Brothers passed the Huntley did the Brothers go about again?
Ans. I don't recollect.
104th ques. How long did the Brothers stand on that tack?
Ans. I don't know.
105th ques. What distance did the Brothers go on that tack?
Ans. I don't know; can't tell about what distance or what time.
106th ques. Was the Huntley reefing her mainsail all this time?
72 Ans. Her mainsail was down all this time, but I do not know if she was reefing.
107th ques. How long proceeding the collision was the last tack made?
Ans. About five minutes. I should do justice to myself and to both parties, if I had refused to testify to anything but the collision itself, because I had forgotten the first part.

108th ques. How long did it take the Brothers to go in stays?

Ans. About two minutes.

109 ques. How long after the Brothers filled away did the Huntley strike her?

Ans. About three minutes.

110th ques. When the Brothers went about how did she bear from you?

Ans. She was parallel with us before going about; she was to the leeward of us just on our lee bow.

111th ques. Just before the Brothers went about, how did the Huntley bear from her?

Ans. She was right astern of the Brothers.

112th ques. How far distant just before the Brothers went about?

Ans. About five or six hundred yards. She was directly astern, as near as I can recollect, and might have been a little to the windward.

113th ques. Was the Huntley's mainsail down when the Brothers went about just before the collision?

Ans. Yes, sir.

73 Examination closed for this day. Adjourned, by consent of both parties, till Monday, the seventh day of May, at 1 o'clock p. m.

MAY 7TH, 1860.—The cross-examination of deponent Edward Decker being resumed by the respondent's attorney, he says:

114th ques. How long had the Capes been about when the Brothers made her last tack proceeding the collision?

Ans. I can't tell exactly, but not very long.

115th ques. At the time the Capes tacked, how did the Brothers bear from her?

Ans. In shore and ahead of the Capes. When we went to go about she was in shore and astern. After we got about she was in shore and ahead.

116th ques. How far distant was she from you when you put down your helm to go about?

Ans. I don't recollect.

117th ques. Did you, at that time, notice them particularly?

Ans. No, sir.

118th ques. Did you at that time particularly notice the Huntley?

Ans. No, sir.

119th ques. How soon after you had got about was your attention called to the Huntley particularly?

Ans. I suppose ten or fifteen minutes.

74 120th ques. At the time you tacked, how did the Huntley bear from you?

Ans. In shore and astern at the moment of putting her helm down, and before we changed our position by luffing.

121st ques. How far distant was she from you?

Ans. I do not recollect.

122d ques. At what rate were the vessels going through the water at that time?

Ans. I suppose the Capes was going about 5 or 7 knots, and I think the Brothers and Huntley were going as fast as that; I mean on this tack, when our sails were full. The Huntley, when her mainsail was in, was going nearly as fast as we were, but not quite.

123d ques. How many tacks had the three vessels made prior to the collision?

Ans. I don't recollect. I don't recollect how many tacks the Capes had made.

124th ques. How long did the Capes stand on the off shore last made by her proceeding the Huntley's lowering her mainsail?

Ans. I don't know.

125th ques. How long did the Carpes stand on her last in-shore tack proceeding the lowering the Hunley's mainsail?

Ans. I don't recollect.

126th ques. Have you seen the Brothers since she sunk?

Ans. I have seen her masts, and know where she lies.

75 127th ques. How far does she now lie from the place of collision, as near as you can judge?

Ans. I could not judge at all on that.

128th ques. How far does she now lies from the shore?

Ans. About two miles—a mile and a half or two miles.

129th ques. After the collision, how far did the Brothers stand in shore before she tacked?

Ans. I don't recollect.

130th ques. How far did she stand off shore on her last tack after the collision?

Ans. I could not tell how far she stood off shore.

131st ques. At the time of the last tack made by the Brothers proceeding the collision, was the Capes under steerage-way and in a manageable condition?

Ans. Yes, sir; perfectly so. I mean she would go about, if we wanted her to do so. She was in manageable condition.

132d ques. You have stated that, after the collision, the Huntley lowered her foresail and jib. Are you as sure of that fact as of any fact you have testified to?

(Objected to by lib'ts' att'y.)

Ans. I am sure she lowered her foresail.

133d ques. Question repeated.

Ans. I am sure she lowered her foresail, and I think she did her jib.

134th ques. Did you see her jib come down, or see it down?

Ans. I saw it down after the collison.

135th ques. How soon after?

76 Ans. I think right away.

136th ques. Previous to the collision, what particularly called your attention to the Huntley?

Ans. Thinking probably there would be a collision. This was five or six minutes before the collision.

137th ques. And at that moment, how far was the Huntley from the Brothers?

Ans. I should suppose she was five or six hundred yards.

138th ques. And at that moment how did the three vessels bear with reference to each other?

Ans. They were both leeward of us.

139th ques. How near on a line with each other and with the Capes?

Ans. The Capes was a little to the eastward of the other two. The others were one right astern of the other, only the Huntley was a little to the windward. The three vessels were about on a line, but the Capes was a little to the eastward of the line of the other two. The Huntley was astern of the Brothers.

140th ques. How long after you saw the Huntley lower her mainsail did the collision occur?

Ans. I could not tell.

On the redirect examination of deponent by the attorney for the libellants, he says:

141st ques. On that forenoon, was it clear or cloudy?

Ans. I believe it was clear.

142d ques. On the last off-shore tacks of the Brothers and
77 Capes proceeding the collision, how long did they stand on with reference to proceeding off-shore tacks?

(Objected to by resp'ts' att'y.)

Ans. I don't know whether they were shorter or not.

143d ques. At the time of the collision and for a little time proceeding, were there vessels other than the three you have referred to in that immediate vicinity?

Ans. I don't recollect whether there was or not.

EDWARD A. DECKER.

Taken, subscribed, and sworn April 30, 1860, before me.

[SEAL.] AND'W KOHLER,
Notary Public.

United States district court, southern district of New York.

SAMUEL S. THORP & OTHERS
vs.
SAMUEL S. HAMMOND & OTHERS. } (A.)

Please to take notice that Edward A. Decker, a witness whose testimony is necessary in this cause, and who is bound on a voyage to sea, will be examined, de bene esse, on the part of the libellants in this cause, before me, a notary public, duly appointed, qualified, &
78 sworn, residing in the city of New York, at my office, No. 27 Wall street, on the afternoon of Monday, April 30, 1860, at 3 o'clock, at which time and place you are hereby notified to be present, and put interrogatories on such examination, if you shall see fit.

Dated New York, April 28, 1860.

ANDREW KOHLER,
Notary Public.

R. H. HUNTLEY, *Proctor for Resp'd'ts.*

(Endorsed:) U. S. district court. Samuel S. Thorp & others vs. Samuel S. Hamond & others. Notice. Examination.

United States district court, southern district of New York.

SAMUEL S. THORP & OTHERS, L'B'TS,
vs.
SAMUEL S. HAMMOND & OTHERS, RESP'D'TS.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick Davy, of said district, being duly sworn, says that
79 he is one of the libellants in above-entitled action, and the captain in command at the time of the vessel called the Brothers, to recover damages as for the loss of which, by collision with a vessel belonging at the time to the respondents, this action was brought; that

above-entitled action is now pending in above-entitled court; that Edward Decker, a seafaring man, is a material and necessary witness for the libellants on the trial of this action, without whose evidence it would not be safe for them to proceed to trial thereof; that said Decker witnessed said collision; that he is bound on a voyage to sea, and is to sail in a few days.

FREDERICK DAVEY.

Sworn to before me April 28, 1860.

AND'W KOHLER, *Notary Public.*

(Endorsed:) U. S. district court, southern district of N. York. Samuel S. Thorp & others vs. Samuel S. Hammond & others. Aff'd't of necessity.

80 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, & State of New York, ss:

I, Andrew Kohler, a notary public in and for the State of New York, by letters-patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, do hereby certify that the reason for taking the foregoing deposition is that the testimony of the witness aforesaid is necessary in the cause in the caption of the said deposition named, and that he is bound on a voyage to sea; that a notification of the time and place of taking the said deposition, signed by me, was made out and served on R. H. Huntley, esquire, proctor for the respondents, residing in the city of New York, on the 28th day of April, 1860, to be present at the taking of the deposition and to put interrogatories, if he might think fit; of which notice a copy is hereunto annexed, marked A; that on the thirtieth day of April, in the year of our Lord one thousand eight hundred and sixty, I was attended by the proctor aforesaid and by Abner Benedict, esq., proctor for the libellants, and by the said witness, and the said witness was
81 by me carefully examined and cautioned and sworn to testify the truth, and the testimony by him given was by me reduced to writing, and thereafter subscribed by the said witness in my presence; and that I am not of counsel or attorney to either of the parties, nor in any way interested in the event of the cause named in the said caption.

[SEAL.] ANDREW KOHLER,
Notary Public in & for the State of New York.

(Endorsed:) U. S. district court. Thorp & others vs. Hammond & others. Deposition of Edward A. Decker, on part of lib'l'ts.

82

83 Supreme court of the State of New York.

SAMUEL S. THORP & O'RS *against* SAMUEL S. HAMMOND & OTHERS. } At chambers, before Mr. Justice Bonney, February 17, 1860.

Deposition of David V. P. Van Name, taken, de benne esse, in pursuance of an order of court made February 15th, 1860.

CITY & COUNTY OF NEW YORK, *ss:*

DAVID V. P. VAN NAME, having been first duly sworn, says:

1st. I am, and have been for two years, master of the schooner "William Capes."

2d Q. How long have you been a captain of any vessel?

Ans. About fourteen years.

3d Q. Are you acquainted with the rules of navigation as practiced in the port of New York?

Ans. I presume I am.

4th Q. Where was your vessel in February last, the 12 inst.?

A. We were beating into the Hook from sea, about half past ten or eleven o'clock.

5th Q. Were you on board your vessel?

A. I was.

6th Q. What crew had you; how many?

84 A. Seven, all told.

7th Q. Were there any vessels in sight?

A. Yes.

8th Q. What vessels?

A. The schooner "Brothers" and another schooner which proved to be the "R. H. Huntley."

9th Q. Were these vessels in proximity?

(Def'ts' counsel objects.)

A. They were.

10th Q. At what time did you first see the "R. H. Huntley" that morning?

A. About daybreak.

11th Q. How far from you was she when you first saw her?

A. Two or three hundred yards.

12th Q. In what direction from you?

A. About east.

13th Q. How far were you from the Jersey shore?

A. About an eighth of a mile.

14th Q. What was the general direction of these three vessels?

A. The R. H. Huntley was to east of us; the schooner Brothers was south of us.

15th Q. How long did you continue in that general position?

A. In the neighbourhood of three hours.

16th Q. Did you keep about, &c.?

(Question withdrawn.)

17th Q. When did you last see the Brothers on that day?

85 A. I last seen her afloat about eleven o'clock in the morning.

18th Q. Did you see any difficulty or collision between her and any other vessel on that day?

(Question objected to.)

A. I saw her about half an hour previous to her sinking in collision with the R. H. Huntley.

19th Q. State what you saw at that time.

A. I was tacking in with my vessel the William Capes; was on the starboard tack. The schooner "Brothers" and the "R. H. Huntley" were on the larboard tack. The schooner Brothers went about on the starboard tack. The R. H. Huntley were reefing mainsail, and ran into the schooner Brothers to the leeward, head on. The capt. of the Huntley, I suppose, ordered the sails lowered, and she backed out.

20th Q. How near to you was the Brothers at the time she tacked?

A. About two hundred yards. We were very near, at any rate, so near that I was about going about myself.

21st Q. How long after the Brothers tacked did the collision occur?

A. Almost immediately; before she could gather headway.

22d Q. Which way was the Brothers heading after she tacked?

A. To the westward.

23d Q. How far from the shore was she when she tacked?

86 A. I should judge about two miles from the Jersey shore.

24th Q. At the time of and immidiately proceeding the collision, which way was the R. H. Huntley heading?

A. To the northward; about northeast by north.

25th Q. In what direction was the wind?

A. About north-northwest at the time of the collision; until about nine o'clock it had been northwest.

26th Q. How was the wind that morning?

A. It was very fresh; very flawy; squally. It was rather more than a full-sail breeze; it was a reef breeze.

27th Q. At the time of the collision, how near had you beat up to Sandy Hook?

A. About five miles south of Sandy Hook.

28th Q. Which was your long tack?

A. Northward.

29th Q. How far from shore did any of your tacks carry you?

A. Not more than two miles.

30th Q. How long before the actual collision had your attention been particularly directed to the Huntley?

A. I was looking at the Huntley as she lowered her mainsail to reef. I suppose that must have been about 15 minutes before the collision.

31st Q. State what you saw of the Huntley's movements from that time till the collision.

A. I saw nothing peculiar, more than the vessel reefing.

87 32d Q. At which tack did she commence reefing?

A. At the end of the short tack she lowered her mainsail to stand off northward.

33d Q. Did you notice any change in the direction of the Huntley from the time she lowered her sail until the collision?

(Question objected to.)

A. None, until very near.

34th Q. In what respect was her direction changed then?

A. She luffed a little. I saw her then immediately, when she was almost in collision with the Brothers, keep off—keep away.

35th Q. Could you see the decks of the Huntley?

A. I could see the decks on the leeward side.

36th Q. Did you see anybody on the deck?

A. No one at all.

37th Q. Do you know at what point of the Brothers was the collision or contact?

A. Abaft the main rigging.

38th Q. About how far from the stern?

A. About 40 or 50 feet I should judge.

39th Q. Immediately proceeding the collision, what would have been the effect of porting the helm on board the Huntley?

(Objected to by defendants.)

A. Half a point of the compass would have cleared the vessel—the Brothers. I mean porting the helm so as to make the Huntley keep off. Half a point would have cleared the Brothers.

40th Q. Immediately proceeding the collision, which of the two
88 vessels, the Huntley and Brothers, was nearest shore on the long tack?

A. The R. H. Huntley, the Brothers just passing her to leeward, while the Huntley was reefing.

41st Q. Which of the three vessels was leading?

A. The William Capes.

42d Q. Which of the two vessels, the Huntley and Brothers, was leading?

A. The Brothers.

43d Q. Previous to the lowering of the mainsail, which of the two, the Huntley & Brothers, was leading?

A. The R. H. Huntley.

44th Q. Which was the leading vessel of the three previous to the lowering of the mainsail?

A. The William Capes had been until we lowered our mainsail. They both passed us while we were reefing.

45th Q. How did you get to be the leading vessel afterwards?

A. We hoisted our mainsail, and the R. H. Huntley lowering mainsail, we again passed both vessels.

46th Q. Immediately proceeding the collision what was the proper manœuvre on board the Huntley under the circumstances?

(Obj. to by def'd'ts.)

A. The proper manœuvre would have been to have kept a lookout & ported the helm, because the Brothers was ahead.

47th Q. What was the proper manœuvre on board the Brothers immediately proceeding the collision for the purpose of avoiding it?

89 A. That is rather a difficult question to answer under the circumstances. To avoid collision with the William Capes the Brothers tacked ship. I know it was to avoid collision. The proper manœuvre was for one of us to go about in order to avoid collision with the William Capes. The William Capes had just gone about tacking in shore. It was the place of the Brothers to go about, being the leeward vessel.

48th Q. After the Brothers went about, what could the Brothers have done to prevent a collision?

A. She could have done nothing. She had no headway to do anything with.

49th Q. How far astern of the Brothers was the Huntley at the time the Brothers went about?

A. Not more than an eighth of a mile. The Brothers, being a large vessel, went about very slow. The R. H. Huntley was, I judge, going about 5 or 6 knots through the water.

50th Q. In what distance, previous to the collision, could the R. H. Huntley have kept off by porting the helm?

A. Two hundred yards.

51st Q. At the time the Brothers went about, about what distance, in yards, were the Huntley and Brothers apart?

A. Don't mistake me now. By going about, I mean when they first put the helm down. At that time the vessels were, I should think, about five or six hundred yards apart.

90 52d Q. After the Brothers had come about how far were they apart?

A. From two to three hundred yards.

53d Q. Had the Huntley sufficient time in which to have kept off?

(Question objected to by def'd'ts.)

A. Yes, sir.

Cross-examined:

54th Q. When the Huntley tacked off shore on the tack in which the collision occurred was she or the Brothers to the windward?

A. The Huntley was to the windward when going about.

55th Q. How far?

A. About a hundred yards. They were very near each other.

56th Q. Which vessel tacked first?

A. I think they both went about pretty much the same time.

57th Q. At that time—that is, the time of the tacking—how far were these two vessels from the Jersey shore?

A. About an eighth of a mile.

58th Q. Did the Huntley lower her mainsail while going about?

A. Yes, sir.

59th Q. After the mainsail was lowered, how long did the Huntley stand on that tack before the collision?

91 A. About fifteen or twenty minutes.

6th Q. And, during that time, do you mean to say she was going through the water at about six knots?

A. Five or six knots.

61st Q. What sail had the Brothers on at that time?

A. Three full sails—mainsail, foresail, and jib.

62d Q. What sail had the Huntly set at that time?

A. Foresail and jib.

63d Q. How far were you from the two vessels at the time of the collision?

A. About a hundred and fifty or two hundred yards.

64th Q. In what direction?

A. A northeasterly direction.

65th Q. At the time the Brothers put down her helm to go about, what was your direction from her then by compass?

A. About northeast by east.

66th Q. At that same time, what was your direction from the Huntley by compass?

A. Very near the same course; not more than half a point more easterly.

67th Q. Do you then mean to say that yourself, the Brothers, and the Huntley were about in the same line?

A. Very nearly so; they were both a little to the westward of me.

68th Q. Which was nearest to you, the Brothers or the Huntley?

A. The Brothers.

92 69th Q. How long had you been about when the Brothers put down her helm to go about?

A. About five minutes.

70th Q. What attracted your attention to the Brothers to notice when she put down her helm to go about?

A. To see if he was going about, knowing she could not clear us by going on.

71st Q. Did you, at that time—that is, the time of putting down his helm—observe the condition of the Huntley and how near the Brothers was to her?

A. I did. We always observe such things.

72d Q. Was there anything to prevent the three vessels from standing any distance northward?

A. Nothing more than the sea is heavy off shore we can get along faster by standing in close.

73d Q. How long before the collision did you observe the Huntley's deck that you have spoken of?

A. About two or three minutes in particular.

74th Q. At that time how far were you from the Huntley?

A. I suppose seven or eight hundred yards.

75th Q. What part of a mile?

A. An eighth or tenth, I suppose.

76th Q. Did you then look to see if the Huntley had a lookout?

A. I did, and saw none.

77th Q. What induced you to look?

93 A. Fear of collision between the Huntley & Brothers.

78th Q. Had you observed the absence of a lookout on board the Huntley at the time the Brothers went about?

A. I had not.

79th Q. How soon after the Brothers went about did you observe that fact?

A. Immediately.

80th Q. Were you within hailing distance of the Brothers?

A. Yes.

81st Q. Did you call the Brothers' attention to the fact that the Huntley had no lookout?

A. No.

82d Q. What proportion or part of Huntley's decks did you see at the time you speak of?

A. About one-half of the deck—the forward part.

84d Q. Did you see all the forward part?

A. Not quite all, being prevented by the tack of the foresail.

84th Q. Then why do you say the Huntley had no lookout?

A. Because I didn't see a man on deck.

85th Q. Might there not have been a man on deck without your seeing him?

A. Yes.

86th Q. Might there not have been a lookout forward without your seeing him?

A. Yes; there might.

87th Q. You have said, the Brothers being large, it took her a good while to go about; how long was it from the time she put down

94 her helm until she gathered headway on other tack?

A. I should judge two minutes or more—not much more; she had not gathered headway when she was struck.

88th Q. Is it customary, taking all the circumstances of this case into consideration, for leeward vessels to tack and stand across bow of the windward one?

A. I don't think it is a proper question. It is proper for the head vessel to keep on and for the leeward or stern vessel to give way.

89th Q. Repeated.

A. It is not customary.

90 Q. Were the Brothers' sails, at the time of the collision, all full?

A. Yes.

91 Q. Was it not proper for her, under these circumstances, to put down her helm and light up her head sails?

A. Her helm was put down. She had not gathered headway in order to make a luff.

92d Q. Repeated.

A. It was proper to put down the helm to bring her up in the wind to recover from falling off after going about, but not proper to light up the head sails.

93d Q. Could not the Brothers have cleared the "Capes" and

95 prevented a collision by keeping away instead of going about?

A. It could have been done if he had taken time enough to do

it, but it was unnecessary. It is not customary. It was time to go about to tack in.

94th Q. Same question repeated.

A. Yes; it could have been done.

95th Q. How far from the beach were the two vessels, Huntley and Brothers, at the time of the collision?

A. Near two miles.

96th Q. If the Brothers had stood on her tack instead of going about, what action would it have been proper for you to adopt on board the "Capes?"

A. It was proper for us to keep on heading in.

97th Q. If the Brothers had stood on instead of going about and the Capes had stood on, would there not have been a collision between the "Capes" and the "Brothers?"

A. I think there would.

98th Q. Would you not have gone about if the Brothers had not?

A. Rather than a collision, I would.

99th Q. How long have you known the captain of the "Brothers?"

A. Seven or eight years; probably more. He is not a relative of mine. My relations with him are friendly.

100th Q. Had you ever known the captain of the "Huntley?"

96 A. I had never seen him before, to my knowledge.

101st Q. How did you learn it was the Huntley?

A. One of the men on the steamtug that towed the Huntley to Jersey City told me so.

102d Q. How long after the collision was it before the Brothers sunk?

A. I judge about half an hour.

103d Q. Did the Brothers tack after the collision?

A. She tacked off shore probably ten or fifteen minutes after.

104th Q. If she had stood directly on without tacking, would she not have reached the beach before sinking?

A. I think she would, but on the in-shore tack she would have sunk faster than on the off-shore tack; but yet I think she [she] would have reached the shore, though I can't tell how badly she was injured.

Re-direct examination:

105th Q. You have testified that the Brothers might have cleared the "Capes" & prevented a collision by keeping away instead of going about. Under the circumstances of this case, as you have related them, was it a proper manœuvre for the "Brothers" to go about?

(Question objected to by def'ts.)

A. Yes; it was proper for the Brothers to go about.

106th Q. Might the Huntley have had a lookout forward without your seeing him; and, if so, where stationed?

97 A. He might have been standing against the foremast on the weather side.

107th Q. Could a lookout have been stationed elsewhere forward without your seeing him?

A. Think not.

108th Q. What angle did the two vessels, the "Brothers" and the Huntley, make on coming in contact?

A. At right angles.

109th Q. If the "Brothers" had stood on, after the collision, instead of tacking, what difference would it have made in stopping the leak, if there was any?

A. If she had not tacked, they could not have seen where she was in-

jured so much; and in tacking off there is a probability of stopping the leak with canvass.

110th Q. Why?

A. Because it thows the hold out of the water.

111th Q. How was the Brothers heading when she sunk?

A. She was heading towards the shore, about northwest, I should judge. She was in tow of a steamtug when she sunk, which caused her to head in shore. They were trying to get in her in.

Re-cross-examination:

112th Q. Do you always on board your vessel, when at sea in the daytime, have a lookout forward while you are reefing?

(Objected to by pl'fs' counsel.)

98 A. It depends on circumstances.

113th Q. Do you know what the custom is on board vessels in this trade, and the same class of vessels, in that respect?

(Objected to by pl'ffs' counsel.)

A. I don't think it is the custom to have a lookout in any particular position, but he should have one somewhere about the deck.

Q. What would have been a proper method on board the "Brothers" to stop this leak?

(Objected to by pl'ffs' counsel, and withdrawn.)

114th Q. Where a vessel was injured in the way you have testified the Brothers was injured, what is the proper method to take to stop the leak?

A. It was proper to have the leak on the weather side. If the hole was large enough to admit a pillow or bed to be stuffed in, and had canvass to put over it, it might be stopped, provided it is not too far out of reach; that would be the proper method.

Re-direct examination:

115th Q. Do you know what was the character and extent of the injury?

A. I do not. I saw with the spy-glass a broken place in the side of the vessel after she went about after the collision.

DAVID V. P. VAN NAME.

99 It is stipulated and consented that the foregoing deposition, signed by the witness, who was sworn by Mr. Justice Bonney, may be read on the trial of this action, without the certificate of said justice as required by the statute, with the same force and effect as if it were so certified.

R. H. HUNTLEY, *Att'y for Def'ts.*

(Endorsed:) Deposition of Capt. Van Name.

100

101 United States district court, southern district of New York.

SAMUEL S. THORP, ISAAC O. THORP, JAMES W. Olsen, Charles Harriman, Josiah M. Reeve, William J. Reeve, Emor Reeve, John T. Chambers, Elias H. Chambers, George Copperthwaite, Christian D. Emson, & Frederick Davey, pl'ffs,

vs.

SAMUEL S. HAMMOND, EDMOND HAMMOND, Isaac Smith, Charles Gillette, Brewster Terry, & Charles Price.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Frederick Davey, one of the libellants above named, being sworn,

saith that he was master of the schooner "Brothers" on the voyage upon which she was lost by a collision with a vessel belonging to the respondents, and to recover damages as for which loss this action was brought; that this suit is at issue; and that Milford Rogers witnessed said collision, and is a witness whose testimony is necessary for the libellants in the above cause; & that said witness is a seafaring man, & is now bound on a voyage to sea, as deponent is informed and believes.

FREDERICK DAVEY.

102 Sworn July 17, 1861, before me.

AND'W KOHLER,
Notary Public.

U. S. district court, southern district of New York.

SAMUEL S. THORP & OTHERS, LIBELLANTS,
vs.
SAMUEL S. HAMMOND & OTHERS, RESPONDENTS. } (A.)

Take notice that Milford Rogers, whose testimony is necessary in this cause, and who is bound on a voyage to sea, will be examined, de bene esse, on the part of the libellants in this cause, before me, a commissioner duly appointed, qualified, and sworn, at my office, No. 27 Wall street, in the city of New York, on the 19th day of July, 1861, at 10 o'clock a. m., at which time and place you are notified to appear and put interrogatories, if you think fit.

Dated July 17, 1861.

Y'rs, &c.

AND'W KOHLER,
Notary Public.

To R. H. HUNTLEY,
Proctor for Respondents.

(Endorsed:) U. S. district court. Samuel S. Thorp & als. vs. Samuel S. Hammond & als. Citation.

103 UNITED STATES OF AMERICA,
SOUTHERN DISTRICT OF NEW YORK,
City, County, and State of New York, ss:

On this nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-one, before me, Andrew Kohler, a public notary in and for the State of New York, by letters-patent under the great seal of the said State, duly commissioned and sworn, dwelling in the city of New York, personally appeared at my office, No. 27 Wall street, in the city of New York, in the said southern district of New York, Milford Rogers, a witness on the part of the libellants in a certain civil cause of admiralty and maritime jurisdiction now depending and undetermined in the district court of the United States for the southern district of New York, wherein Samuel S. Thorp, Isaac O. Thorp, James W. Olsen, & others are libellants, and Samuel S. Hammond, Edmund Hammond, Jacob Smith, and others are respondents.

And the said MILFORD ROGERS, having been by me first cautioned and sworn to testify the whole truth, did thereupon depose and say:

My name is Milford Rogers.

1st ques. On February 12th, 1860, what was your business?

Ans. I was mate of the schooner Brothers.

2d ques. Who was the captain?

Ans. Frederick Davey.

104 3d ques. What became of that vessel?

Ans. She was run into by the schooner R. H. Huntley and sunk.

4th ques. State the facts and circumstances connected with that running into and sinking.

Ans. On the 12th day of February, 1860, we were beating up the beach. The William Capes and the R. H. Huntley were in company with us. The Capes was ahead of us, and went about, and we had to go about to avoid a collision with the Capes.

(The latter part of his answer is objected to by respondents' attorney on the ground that it is an inference of the witness.)

And the R. H. Huntley run into the schooner Brothers and sunk her.

5th ques. How were the three vessels you have named sailing do shortly before the collision, with reference to each other with reference to the wind?

her Ans. On the wind, the Capes ahead, the Brothers next, the R. H. Huntley astern.

1 6th ques. What was the direction of the wind at and shortly before the collision?

Ans. North-northwest.

e 7th ques. What direction was the Capes sailing before she went about to go in shore?

Ans. Northeasterly direction.

8th ques. Before the Capes went about to go in shore, in what direction were the three vessels sailing?

105 Ans. They were all sailing pretty much in the same direction.

9th ques. At the time the Capes went about, where was the Brothers in reference to her?

Ans. She was astern.

10th ques. How far?

Ans. About five hundred yards.

11th ques. At the time the Brothers went about to go in shore, how far astern was the Huntley?

Ans. About five hundred yards.

12th ques. How long after the Brothers went about to go in shore was she struck by the Huntley?

Ans. She was struck immediately as she payed off.

13th ques. How far had the Brothers gone on the in-shore tack when she was struck by the Huntley?

Ans. She had not gone far enough to get her headway on her.

14th ques. How rapidly did the Brothers gather headway in going about; slow or quick?

(Objected to by respondents' att'y.)

Ans. Slow.

15th ques. Whereabouts was the Brothers struck?

Ans. Aft of the main rigging.

16th ques. Do you know whether any signals were made on board of the Brothers after going about?

Ans. There were; we hallooed to them to keep off, I suppose, fifteen or twenty times.

17th ques. Did the Huntley pay any attention?

(Objected to by resp'd'ts' att'y.)

Ans. None at all.

18th ques. Do you know whether there was any lookout aboard
106 the Huntley at the time of and immediately proceeding the collision?

Ans. There was none, to the best of my knowledge.

(Answer objected to as not responsive.)

19th ques. Whereabouts, in reference to the beach, was this collision?

Ans. In an easterly direction from the Highlands.

20th ques. How far from shore?

Ans. About two miles.

21st ques. How was the wind at that time, as to force?

Ans. A reef breeze.

22d ques. Of how many did the crew of the Brothers consist?

Ans. Seven altogether.

23d ques. How long had the three vessels been sailing in company?

Ans. Some three or four hours that morning?

24th ques. How was the weather; clear or cloudy?

Ans. Clear.

25th ques. How far had the Brothers gone on her last off-shore tack when she went about?

Ans. Three or four miles.

26th ques. Do you know whether she run out that tack?

Ans. Yes, I know.

27th ques. Had she?

(Objected to by resp'd't's att'y.)

A. She had; we could gain up faster by keeping in shore.

28th ques. What was the condition of the sea at that distance from the shore when you went about?

Ans. It was rough.

107 29th ques. How was it further in shore?

Ans. It was smooth in shore.

Being cross-examined on the part of the respondent, he says:

1st ques. How far were you from the shore when you made your last off-shore tack?

Ans. About an eighth of a mile when we went about to stand off.

2d ques. State the distance in yards.

Ans. Six or seven hundred yards.

3d ques. What was the course of the wind at that time?

Ans. North-northwest.

4th ques. When fully on that last off-shore tack, what was your course by compass?

Ans. Northeast by north.

5th ques. How long did you stand on that tack?

Ans. Fifteen or twenty minutes.

6th ques. About how fast was the Brothers sailing?

Ans. Seven or eight knots.

7th ques. At the time of your tacking to stand off shore, where was the Huntley?

Ans. She was in shore of us from a hundred to a hundred and fifty yards, and to the windward.

8th ques. As the Huntley went about did you notice whether she lowered her mainsail to reef it?

Ans. I did.

9th ques. Did the Brothers and the Huntley tack about to stand off shore about the same time?

108 Ans. They did very near at the same time, the Huntley a very little ahead.

10th ques. Did you pass the Huntley on that off-shore tack?

Ans. We did.

11th ques. How soon after you went about did you pass her?

Ans. Ten minutes, I suppose.

12th ques. Did you pass to the windward or leeward of her.

Ans. To the leeward.

13th ques. At what distance to the leeward did you pass her?

Ans. One hundred yards.

14th ques. Was the Huntley's mainsail still down at the time of the collision?

Ans. It was.

15th ques. Had she completed reefing?

Ans. I don't know whether she had or not. The mainsail had been down ever since she tacked off shore.

16th ques. Where were you, personally, at the time the Brothers made her last tack to stand in shore, just previous to the collision?

Ans. I was amidships.

17th ques. Who was at the helm of the Brothers?

Ans. Captain Davey.

18th ques. How soon after your helm was put down did this hallooing commence, of which you have spoken?

Ans. About two minutes, I suppose.

19th ques. Had your sails filled away on the other tack when you commenced hallooing?

Ans. They were just filling off.

109 20th ques. What part of a mile was the Huntley from you when you went about to stand in?

(Objected to by libellants as having been answered.)

Ans. A tenth part; an eighth or tenth part, I suppose.

21st ques. How, as to force and direction, had the wind been blowing for six hours previous to the collision?

Ans. North-northwest and a northwesterly direction.

22d ques. Was it not about northwest until within a half an hour or an hour previous to the collision?

Ans. It was about an hour or an hour and a half previous.

23d ques. How far below the Highlands was your last off-shore tack made at the time the Huntley took in her mainsail?

Ans. Between four and five miles. When I speak of the Highlands I mean the light-houses on the Highlands.

24th ques. How long had the wind been blowing a reef breeze?

Ans. Half an hour previous to the collision.

25th ques. Have you ever seen the tops of the Brothers' masts out of water since she sank?

Ans. I have.

26th ques. How deep is the water there?

Ans. Some six or seven fathoms, I suppose.

Re-direct:

110 1st ques. On the last off-shore tack before the collision what sails had the Brothers set?

Ans. Three full sails; mainsail, foresail, and jib.

2d ques. On the same tack did either the Huntley or the Brothers fall off from the wind?

Ans. The Huntley did not hold as good a wind as we did.

Re-cross:

Ques. Under what sail was the Huntley on that last off-shore tack and at the time of the collision?

Ans. Full foresail and full jib.

Re-direct:

Ques. When are you going to sea?

Ans. I can't tell when I am going; I may possibly go away this week.

Ques. Are you seeking for an opportunity to go?

Ans. Yes, sir; I am. I am a seafaring man.

MILFORD ROGERS.

Taken, subscribed, and sworn July 19, 1861, before me.

AND'W KOHLER,
Notary Public.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Andrew Kohler, a public notary in and for the State of New York, by letters-patent under the great seal of said State duly commissioned and sworn, dwelling in the city of New York, do hereby certify
111 that the reason for taking the foregoing deposition is that the testimony of the witness aforesaid is necessary in the cause in the caption of the said deposition named, and that he is bound on a voyage to sea; that a notification of the time and place of taking the said deposition, signed by me, was made out and served on Richard H. Huntley, esquire, attorney for the respondents, on the seventeenth day of July instant, to be present at the taking of the deposition and to put interrogatories, if he might think fit, of which notice a copy is hereto annexed, marked A; that on the nineteenth day of July, in the year of our Lord one thousand eight hundred and sixty-one, I was attended by R. H. Huntley, attorney for the respondents, and by Abner Benedict, the attorney for the libellants, and by the said witness; and the said witness was by me carefully examined and cautioned, and sworn to testify the truth, and the testimony by him given was by me reduced to writing, and thereafter subscribed by the said witness in my presence; and that I am not of counsel or attorney to either of the said parties, nor in any way interested in the event of the cause named in the said caption.

[SEAL.]

AND'W KOHLER,
Notary Public in & for the State of New York.

112 (Endorsed:) 16, 36. U. S. district court. Samuel S. Thorp et als. vs. Samuel S. Hammond et als. Deposition of Milford Rogers, take the 19th July, 1861, on behalf of libellants, before And'w Kohler, not. pub. Filed 22 July, 1861.

113 U. S. district court.

SAMUEL S. THORP AND OTHERS
against
SAMUEL S. HAMMOND AND OTHERS.

Deposition taken, de bene esse, November 26th, 1862.

HENRY GILLETTE, being sworn for the respondents, testifies as follows:

Q. Where do you reside?

A. At Islip, Long Island.

Q. What is your occupation?

A. I follow the sea, and am now master of the schooner Neptune's Bride.

Q. How long have you followed the sea?

A. About nine years.

Q. Are you acquainted with the customs and mode of navigating schooners on the coast, and particularly on the Jersey shore?

A. Yes, sir.

Q. When several vessels are in company in the daytime, and one of them is engaged in reefing, how is she regarded and treated by the other vessels.

(Objected to by libellants' counsel.)

A. If a vessel has her sails in, it is the other vessel's place to keep out of the way of her.

114 Q. What do you mean by saying if the vessel has her sails in?

A. I mean if the vessel has them lowered down on deck.

(Question before the last repeated.)

I don't understand the question at all. If I knew how each vessel was situated, I could tell.

Q. Is there a custom among sailing vessels by which a vessel reefing is regarded in a different light frome one not reefing?

(Question objected to by lib'ts' counsel.)

A. I should say yes, yes.

Q. What is that custom?

(Objected to by lib'ts' counsel.)

A. The custom is for the vessels under way to keep clear of them—to give way to them.

Q. What do you mean by a vessel under way?

A. A vessel with her sails up; a vessel reefing is only half under way; she it not under way. I don't consider her under way unless her sails are up taut, and she is on her course.

Q. Suppose 3 vessels standing up the Jersey beach with the wind N.N.W., in the daytime, and one of them, while so standing up the beach, lowers her mainsail to reef it, how is she to be regarded and treated by the other two vessels?

(Objected to by libellants' counsel.)

115 A. I should regard her the same as a vessel at anchor.

(Objected to by lib'ts' counsel.)

Q. The question is, how is she regarded by the custom; not how you regard her?

A. The custom is to give way to her.

Q. Suppose three vessels called the Capes, Brothers, and Huntley are standing up the Jersey beach with the wind N.N.W., the Capes ¼ of a mile to the windward, the Brothers about 400 yards to the stern and leeward of the Huntley, and from ⅛ to ¼ of a mile from the shore; in this condition they tack to stand up the beach; the Huntley lowering her mainsail to reef it while tacking; the Brothers with 3 full sails; the Huntley under foresail and jib; they stand up the beach until the Brothers has passed the Huntley; when she (the Brothers) meets the Capes standing in shore; the Capes is then 200 yards distant from the Brothers, and the Brothers 600 yards distant from the Huntley; what is the duty of each of the respective vessels?

(Objected to by lib'ts' counsel as presenting a hypothetical case not warranted by the record.)

A. The way, I understand, the Capes is on the starboard tack; the

other two vessels are on the port tack. It is the Brothers' place
116 to keep off and go under the stern of the Capes.

Q. Suppose the same circumstances as in the last question, with the exception that the Huntley and the Brothers are from 250 to 300 yards apart, instead of 600 yards, then what is the duty of the vessels?

(Same objection as last made by lib'ts' counsel.)

A. It is the duty of the Brothers to port his helm and to go under the stern of the Capes.

Q. Is it customary for fore-and-aft vessels on the Jersey shore, while reefing in the daytime, to have a lookout specially as such?

(Objected to by lib'ts' counsel.)

A. No, sir, it is not.

Q. Does such a custom prevail anywhere to your knowledge?

(Objected to by lib'l't's counsel.)

A. No, sir.

Being cross-examined, the witness says:

Q. How old are you?

A. 25 years old.

Q. You have always resided on L. I., haven't you?

A. Yes, sir.

Q. When did you commence following the sea?

A. Nine years ago, before the mast.

Q. How long did you continue before the mast?

A. About 4 years.

117 Q. In what capacity were you next?

A. 2d mate part of the time; mate most of the time.

Q. What portion of the last five years have you been master of a vessel?

A. Since two years ago last July.

Q. What vessels were you captain of?

A. I have been captain of only one vessel, the Neptune's Bride.

Q. What kind of a vessel is she?

A. A fore-and-aft schooner of 263 tons.

Q. In what trade engaged?

A. In all kinds; to England, to Wilmington, & Virginia, to S. America; I have been to England, South America, to Wilmington, to Savannah, and to Virginia in her.

Q. Do you know Captain Hammond?

A. Yes, sir; I have seen him.

Q. How long have you known him?

A. Knew there was such a man as long as I can remember. We have never been very intimate; have seen him 2 or 3 times a year for the last five years; generally speak to him when I meet him. I never sailed under him. I live three miles or 3½ from him. I have lived as many as ten years within 3½ miles of him; that is, my residence is there. I did not come from Long Island to attend this trial particularly. I was in New York with my vessel. I came to court to see one of the parties.
118 Some one of the parties invited me to come up here, and I can't tell who it was.

HENRY GILLITTE.

Sworn to before me this 26 day of November, 1862.

EUGENE H. POMEROY,
Notary Public, New York City.

119 WILLIAM LISCUM, being sworn for the respondents, testifies as follows:

What is your occupation?
Seaman.
In what capacity?
Master.
Of what?
At present master of the schooner J. F. Farland.
How long have you followed the sea?
21 years.
How long have you been master?
About 15 years.
Have you been in fore-and-afters all this time?
Yes, sir.
Is there a custom with reference to the manner in which a vessel reefing is to be treated by a vessel not reefing at sea or on the coast?
(Objected to by libell'ts' counsel.)
There is.
What is that custom?
(Obj't to by libell'ts' counsel.)
The vessel in the act of reefing has the right of way.
Is it customary for a vessel reefing in the day-time to have a lookout specially for that purpose?
(Objected to by lib'l'ts' counsel.)
It is not.

120 The three vessels in company when this collision occurred were the William Capes, the Brothers, and the R. H. Huntley. They had been standing up the Jersey beach all the morning, and between ten and eleven o'clock were in this position. They had all stood into the Jersey shore between 15 and 20 miles below Sandy Hook, on their way to New York. The wind was N.N.W., blowing fresh. They stood in towards the Jersey shore to within from $\frac{1}{8}$ to $\frac{1}{4}$ of a mile of the beach. The Capes was about $\frac{1}{4}$ of a mile ahead, and to the windward of the Huntley. The Brothers was about 400 yards to the stern and leeward of the Huntley. The Capes has gone about, and is standing up the beach when the Brothers and Huntley both tack about the same time. As the Huntley goes in stays, she lowers her mainsail to reef it. The 3 vessels stand on up the beach from 15 to 20 minutes, when the Brothers has passed the Huntley, and is 600 yards ahead of her, about one point off her lee bow. While these two vessels are in this position, the Capes had tacked and been standing in shore about 5 minutes, and is now sailing across the Brothers' bow at about 200 yards distance; while so situated, the Brothers puts down her helm, and goes about across the Huntley's bow, and the result is a collision with the Brothers.

121 Was this a proper manoeuvre on the part of the Brothers?
(Objected to as assuming a state of facts utterly unwarrantable by the record.)
I should say not.
In what respect was it not proper?
In the first place, the Huntley was disabled by reefing. In the next place, it is to be supposed that the Brothers saw it, and knew he was in that condition. It was the place of the Brothers to have [illegible]d her helm and gone under the stern of the Capes, being that distance off. The Brothers was in a condition to manage his vessel, having full sails on.

Suppose all the circumstances just as stated in the last question, with the exception that the Brothers is from 250 to 300 yards ahead of the Huntley and about 2 points off her lee bow, what do you then say of the Brother's manoeuvre in going about?

(Same objection as last.)

I should say that it was an improper movement. I should say the vessel under sail was to nigh the vessel reefing to tack.

Have you seen the masts of the vessel Brothers since she was sunk?

Yes, sir.

Are you acquainted with the working of [of] centre-board vessels?

Yes, sir.

122 In an 8-knot breeze, with a vessel with a foresail, mainsail, and jib, centreboard, how soon would she feel her helm put hard up, she being loaded and on the wind?

Some vessels are slow, according to the action of the mainsail; it would take some two minutes, some others are quicker, and would keep off at once. It is owing to the rig of a vessel.

Do you know the Brothers, and the way she works?

Yes.

How much, in your opinion, would the Brothers, going 8 knots, fall off in going 200 yards?

I should say from 3 to 4 points.

In going 400 yards, how much?

I should say all you wanted her to—at right angles.

Do you know the Huntley, and how she worked?

I do.

With the Huntley on the wind, reefing, foresail and jib set, how far would she fall off in going 600 yards?

The Huntley would not fall off very much. She would go very near, being a deeply ladened vessel. I mean she would not make much leeway from the direct line of heading.

How much nearer, if any, would she lie to the wind, and make
123 her course, with all sails set, than with foresail and jib only?

I should say two points.

Being cross-examined, the witness says:

I have sailed mostly coastwise. I know Capt. Hammond, and have known him 15 years. I reside on Long Island, 4½ to 5 miles from Captain Hammond's residence. I have seen the masts of the Brothers, I should say, 4 times. They are, I should say, from 2½ to 3 miles from the shore.

WILLIAM LISCUM.

Sworn to before me this 26th day of November, 1862.

EUGENE H. POMEROY,
Notary Public, New York City.

124

125 CHARLES PRICE, being sworn for the respondents, testifies as follows:

Do you know Capt. Sam'l S. Hammond, master of the Huntley?

Yes, sir.

Did you know Capt. Davey, of the Brothers?

Have seen him 2 or 3 times, but have no personal acquaintance with him.

Were you present at a conversation had between Captain Hammond, Captain Davy, and Mr. Huntley, at Mr. Huntley's office, in the fall of 1860?

I was.

Did you hear Capt. Davey state any reason for this collision in that conversation?

What did he say?

(Objected to by lib'l'ts' counsel, on the ground that the circumstances, occasion, and object of the interview are not mentioned to the witness.)

As near as I can recollect, the conversation between Capt. Hammond and Captain Davy was this: Capt. Hammond said to Capt. Davy, "You hadn't ought to have gone about right under our bow." Capt. Davy replied, "I thought I had room enough to clear you," or "thought I could clear you." Capt. Hammond said, "Capt. Davy, why didn't you admit that before?" Capt. Davy said, "he had admitted it." Capt. Hammond said, "he hadn't." Capt. Davy said, "he had." Capt.
126 Hammond says, "Why, God damn it." Mr. Huntley then interfered and said, "This thing is all settled now, and you had better not say anything more about it." I don't recollect any further conversation between Capt. Hammond and Capt. Davy after that. There might have been some, but if there was I don't recollect it.

Had there been a settlement, or a proposed settlement, at that time?

There had.

Previous to that time, had there been a negotiation as to a settlement?

Yes, sir.

What was the result of that negotiation?

Capt. Davy agreed to take $1,200 and withdraw both of these suits, if Captain Thorp would agree to it.

(This answer objected to by lib'l'ts' counsel as irrelevant and immaterial, and to the question as leading.)

And arranged with Capt. Hammond to meet at Capt. Thorp's office the next day, after we were at Mr. Huntley's office. I mean by both suits, the suits of the coal company and the suit of Thorp & others.

Being cross-examined, the witness says:

I went to Mr. Huntley's office with Capt. Hammond. Don't know if at his request. Think quite likely he asked me. The arrangement I speak of with Capt. Hammond and Davy was at one sitting, at
127 Mr. Huntley's office. This is the occasion alluded to when Capt. Hammond, Davy, and myself were present. I think I was never there with Capt. Hammond and Davy before or since; don't recollect. I am not positive whether Capt. Davy was or was not at Mr. Huntley's office when I got there. I have known Capt. Hammond probably 20 years. I resided between ¼ or ½ a mile of his residence. I am not an owner in the Huntley. Have no interest in her. Was one of the owners at the time of the collision. I don't recollect when I sold my interest. I sold when the others sold, about two years ago. They all sold together. I don't recollect whom we sold to. From East somewhere. Gillett was not an owner at that time, nor was Liscum. At the time I went to Mr. Huntley's office I think she had been sold, but won't be positive.

Re-direct:

I remember seeing other parties, owners of the schooner Brothers, at Mr. Huntley's office, with reference to a settlement. I think in the spring, before Captain Thorp was one, and a gentleman they called "the

Quaker," and I think there were one or two others, a proposition of settlement was made by them. I do not recollect whether Capt. Davy was in town or not at that time. Don't know what Capt. Thorp said about that. At the time of the collision, I owned ½ of the Hunley.

What directions, if any, did Captain Hammond receive from you as to the manner of sailing, managing, or conducting the Huntley?

I told Captain Hammond, before she went out of Port Jefferson Harbor, where she was built, to do with my part of the vessel as he
128 did with his own. I believe those are all the directions I ever gave him. Captain Hammond sailed the vessel on shares.

Do you know whether the owners ever gave Captain Hammond any directions as to where he should sail the vessel, or the manner of sailing her and navigating?

I do not.

Did you ever give any directions as to where he should sail her, or how he should manage or navigate her?

No, sir; I never did.

Re-cross:

Captain Hammond sailed that vessel all the time. I owned her, I think, about 7 years.

How much did Captain Hammond receive as his compensation for sailing the vessel?

I believe that he had ½ of the earnings of the vessel.

He received ½ as his wages, did he not?

I don't know whether he called it wages or what.

What was it that he received, "wages or what?"

(Objected to by respondents' counsel.)

I called it ½ of the earnings.

(Question repeated.)

½ of the earnings.

Were the ½ earnings his wages for sailing the vessel or not?

(Objected to by resp'd'ts' counsel as already answered.

I have answered that question; I called it his share of what the vessel made.

Do you know whether the ½ of the earnings which he received were his wages for sailing the vessel?

(Objected to by resp'd'ts' counsel as already answered.)

129 I know Captain Hammond sailed the vessel on shares, and that is all I know.

(Question repeated. Objection repeated.)

I don't know whether Captain Hammond ever had a dollar in the world or not. I don't know whether to call them wages or not. I answer the question as fairly as I could.

Did the captain sail that vessel for any given period?

For no given period.

Couldn't the owners of that vessel at any time have discharged Captain Hammond, and put in another captain?

(Objected to by resp'd'ts' counsel as a question of law and not of fact.)

Captain Hammond held the papers, and I don't know law enough to know how to get him out; but I suppose if a majority of the owners wished it, it could have been done by law.

Do you know the manner in which down-east vessels are sailed on shares?

Don't know what you mean by down-east vessels. This vessel was

sailed on shares by Captain Hammond, in the same way that vessels are usually sailed in our section, Patchogue, Long Island, and that vicinity, I suppose. The owners of the Huntley were mostly Long Island men. I am not a seafaring man; I am a house carpenter, and my business is mostly in the region where I reside. I come to
130 New York sometimes 5 or 6 times a year, and sometimes not. I think I know all the owners. Some of the owners were seafaring men. There were four seafaring owners.

Do you know whether the owners had the power to send that vessel on a particular voyage while he held her?

I don't know.

Who made the arrangement with Captain Hammond to sail that vessel?

Don't know only what I told you, that I told Captain Hammond to do with my part as he did with his own. That is the only arrangement or agreement I made with him.

Do you know what arrangement or agreement was made with him by the other owners?

Don't know.

CHARLES PRICE.

Sworn to before me this 26th day of November, 1862.

EUGENE H. POMEROY,
Notary Public, New York City.

131 CHARLES L. GILLETTE, being sworn for the respondents, says:

I was one of the owners of the Huntley at the time of the collision. I owned ⅛ of her. I don't know when she was built, but it was about '52; between 1851 and 1852. I was an owner in her at the time she was built. There was an arrangement at the time the vessel was built as to who was to sail it. Samuel Hammond was to sail her. The arrangement was between Samuel Hammond and the other owners. (Witness explains.) I came back from England in '51, and an acquaintance of mine said, "We are going to build a vessel for Samuel Hammond. Have you a mind to take a share?" Captain Edmund Hammond said, "I have got ¼ of her; will you take an eighth?" I told him I would. At the same time I asked him if he was to sail the vessel the same as we did, i. e., Captain Ed. Hammond and myself. He said, "Yes." We were both sailing vessels at that time. And from that time I made the payments on the vessel building as they became due. Captain Hammond was to pay the owners one-half of the nett earnings of the vessel after paying the port charges. He was to pay that ½ for the use of the vessel, or income or interest. Captain Hammond victualled and manned
132 her; Captain Hammond paid for the crew; Captain Hammond had a carte blanche to go where he liked, and engage in whatever trade he liked.

(Foregoing testimony objected to by libellants' counsel.)

Had the general owners of the vessel any control over Capt. Hammond as to his mode of navigating the vessel, or as to what voyage he should engage in?

None.

I have been master of a vessel 14 years. Have followed the sea since '41.

Do you know what the custom is between vessels, one vessel reefing and the other not reefing at sea and on the coast?

I do.

What is it?

(Question objected to.)

It is the custom for the one under working sail to give way.

The question put to Capt. Liscum as to the position as the three vessels, and their mode of navigating and manœuvring on the day of the collision, repeated to this witness, and he is asked if, under the circumstances, the Brothers was properly manœuvred; and, if not, in what respect she was not?

(Same objection made as to former question.)

133 Answer. I think not. The Brothers should have kept off and gone under the Capes' stern.

Suppose the same condition as before stated, except that the Brothers is from 250 to 300 yards from the Huntley when she tacks, what then should she have done?

(Same objection.)

Answer. The Brothers should have kept off so much the more; she should have kept off, if necessary.

Is it customary and usual in fore-and-aft vessels at sea or on the coast, while reefing in the daytime, to have a lookout specially stationed as such?

Ans. I never saw it done. It is not customary.

Being cross-examined, witness says:

Who did the business of that vessel after she was built; I mean, at what house in New York was her business done?

Ans. Capt. Hammond. I knew no one else in the matter. I have been to Mailler & Lord's, and seen Capt. Hammond there, and supposed he did business there.

Q. Do you know any other house in New York at which the business of that vessel was done?

Ans. I don't know of any house.

Q. Who were the other owners with you in that vessel when you owned in her?

134 Ans. Jacob Smith, Edmund Hammond, William Sell, Samuel Hammond, Charles Price, Henry Ketcham. I believe Brewster Terry was an owner; but I can't name the others.

Q. Was that vessel sailed in the same way during all the time you owned in her?

Ans. Yes.

Question. Was there ever any other or different management or agreement with Capt. Hammond as to sailing the vessel than the one you gave in your direct examination?

Ans. No, sir.

Q. Where do you reside?

Sayville, Long Island, about 5 miles from Capt. Hammond's residence. I have known Capt. Hammond thirty years.

Up to a year ago I spent most of my time at sea; most of the time sailing coastwise.

The acquaintance who spoke to me in regard to taking a share in the Huntley was Edmund Hammond.

Q. Don't captains who are allowed half the earnings for sailing, generally go where they chose with the vessel?

Ans. Yes, sir.

Were you ever present when the agreement was made for sailing that vessel between Capt. Hammond and any other owner than yourself?

Ans. No, sir.

135 Did you state in your direct examination all that was said on the occasion of your agreeing to buy in the vessel?

Ans. Yes.

Q. Did the conversation last alluded to constitute all the agreement so far as you were concerned with Captain Hammond, as to sailing the vessel?

Ans. Yes.

Q. During the time you owned in that vessel, how often did you see Capt. Hammond?

Ans. I can't tell.

Q. In what form did you receive your share of the vessel's earnings?

Ans. Invariably in cash.

Q. When Capt. Hammond was at sea, from whom did you receive those earnings?

Ans. I don't recollect of ever receiving any when he was at sea.

Q. Was not that vessel sailed in the same way by Capt. Hammond, as vessels usually are by captains who receive one-half of the earnings for sailing?

(Question objected to.)

Ans. I presume.

Q. It was competent for the other owners to put in another captain if they saw fit, was it not?

Ans. I think not. I don't know how they would get him out.

Q. Why?

Ans. That is what we would all like to know. I know of a

136 case where they worked a year or two to get a man out and didn't succeed. It was because the captain was an owner in the vessel.

Question. Do you know of any other difficulty that would have been in the way of removing Captain Hammond, except his being an owner in the vessel?

Ans. No.

Re-direct.

I understand you to say this vessel was built for Capt. Hammond.

She was.

From whom did you receive your share of the vessel's earnings?

From Capt. Hammond.

You have said that Capt. Hammond sailed the Huntley as vessels are usually sailed on shares; state how vessels are usually sailed on shares.

(Objected to as not stating former answer, and withdrawn.)

You have said that you presume that vessels usually sailed by captains who receive one-half of the earnings for sailing, are sailed in the same way as the Huntley was sailed by Capt. Hammond; state how vessels are sailed where one-half of the earnings are paid to captains for sailing.

137 (Objected to as not properly reciting the [the] witness evidence.)

Ans. The captain receives one-half the nett earnings, and the owners the other. The captains pay the crew and victual the vessel. It appears to me the question answers itself—that is all of the answer.

Question repeated.

The captain has to victual and man the vessel; paying the owners one-half the nett freights after deducting ship-chandlery, sail-makers, blacksmith's bills, &c.

Who has the control and management of the vessel?

The captain.

Entirely so?

Entirely.

What do you mean by the control and management of the vessel?

He can go where he pleases and do as he likes with her, and sell her if he pleases. It was so with us; both the R. H. Huntley and the John Roe were sold so, and I was away at the time and knew nothing about it. I owned in both of them.

Re-cross:

138 Question. Where captains sail vessels having many owners, under a contract to receive ½ earnings for sailing, don't they (the captains) generally get their own freights; go on whatever voyage they choose, and generally and completely control the vessel and her business?

Ans. Yes.

Q. Was not that substantially the condition of the Huntley and her owners; and was that not substantially the state of the case and the agreement as to sailing, in the matter of the Huntley?

Ans. Yes.

CHA'S GILLETTE.

Sworn to before me this 29th day of November, 1862.

EUGENE H. POMEROY,
Notary Public, New York City.

139 SAMUEL S. HAMMOND, sworn for the respondent, testifies as follows:

What was your business in February, 1859?

Following the water. I was in the schooner R. H. Huntley; captain of her.

How long have you been engaged in following the sea?

Twenty-four years.

In what trade or trades?

In the coasting trade generally; generally on the coast between Boston and Mexico, and also some European voyages.

How long have you been master?

About 14 years, I think.

In the month of February, 1859, from what port had you sailed, and unto what port were you bound with the schooner R. H. Huntley?

I was from Baltimore, bound to New York, with a cargo of coal; between 212 and 220 tons.

At what time on that voyage did you first discover the schooner Brothers?

It was on the 12th of Feb'y, about 7 o'clock in the morning, about 25 miles below Sandy Hook, southward. We were about ¼ of a mile ahead of her. The William Capes was a little ahead of us, and to the windward. She was about ⅛ of a mile ahead of us. We were not far from a half a mile from the Jersey shore, standing up the beach, with about 1 point of the sheet started. The wind was about N. W. by W.

State what occurred from this time to the collision.

140 We were all three standing on that course until about 9 o'clock, under full sail, mainsail, foresail, and jib, flying-jib, and two topsails; just after that we clewed up our topsails, the wind freshening. About 10 o'clock the William Capes took in her mainsail, and

reefed it. About that time the wind headed us off a little. We had been holding our course up the beach, till about that time. At that time we were a little ahead of the Capes. From that time we headed about 2 points off our course for about 1 hour, I think. We were then about 3 miles from the shore. We tacked, and stood in shore. In standing in shore we passed the William Capes. We stood in to within about ⅛ of a mile of the beach. The Brothers stood in with us, and then we tacked again. The Brothers then was on our lee quarter, and from 2 to 300 yards astern. At the time of tacking we lowered our mainsail and went to reefing, and from about ten to fifteen minutes after, I saw a vessel's jib-boom just clear of me. It was right ahead of us. I heard somebody just at that time sing out, "Keep off." I think it was my mate, Mr. Pruyn. I immediately throwed the wheel hard aport. We fell off a little before we struck the schooner "Brothers." We struck the Brothers.

At what speed were the vessels respectively going before you lowered your mainsail to reef?

141 They were all going about 7 or 8 knots. There was but very little difference in our rate of going all the morning. After lowering the mainsail to reef, we were going about 4 or 5 knots.

At the time you struck the Brothers, how long had you and she been standing on the off-shore tack?

About ten or fifteen minutes.

How near was your mainsail reefed at the time of the collision?

We had pretty near finished it. It would have taken probably about 4 or 5 minutes longer. The sail was dry and in good order for handling. It usually took us not far from fifteen minutes to reef our sail under the conditions there then was.

At what distance were you from the shore when you struck the Brothers?

(Objected to and withdrawn for the present.)

Did you observe at the time of striking the Brothers at about what distance you were from Jersey shore?

(Obj'd to by lib'l'ts' counsel.)

Of course I could judge. It was ¾ of a mile. It did not exceed that distance from the shore, I don't think.

On the last previous tack to the one of which you are now speaking, when the Huntley and Brothers tacked to go in shore, how far and in what direction were you from the Brothers?

142 The "Brothers" was about 4 or 500 hundred yards right astern of us, on the wind. She was a little to the leeward of us.

Was there any danger of a collision between you and the Brothers at the time of that tack?

(Objected to by lib'ts' counsel as leading.)

That was the first tack made that morning. There was no danger of a collision, because the R. H. Huntley was far enough ahead to avoid it.

At the time you first tacked to stand?

(Question withdrawn, as having been already answered.)

How many men had you on board the Huntley at that time, including yourself?

Six, all told.

Was that number sufficient to man her?

Yes, sir. It was the usual number, and sufficient.

What was the tonnage of the Huntley?

One hundred and ninety-three, (193.)

What is the custom with vessels at sea or on the coast as to their treat

ment of another vessel in their company standing in the same general direction in which they are, and reefing while they are not?

The custom is for the vessel that is not reefing to give way to the one that is reefing.

What is the custom at sea or on the coast as to a lookout on board of a vessel while reefing in the daytime?

143 (Objected to by lib'ts' counsel, also to the question proceeding.)

The custom is, for a vessel reefing in the daytime, not to have a lookout.

At about what hour did the collision occur?

At 11 o'clock, or a little after, the collision occurred.

State what was done on board the "Brothers," so far as you saw, from the time of the collision till the time she sunk.

The Brothers kept on in shore long enough to get way on her, to get in stays. She then went about, and headed off shore long enough for a steamboat to get a hold of her. Can't say how long it was. I did not see her when the steamboat got hold of her. I saw her when she sunk. She was not far different from a mile from me, to the eastward of me, and sunk about E. N.E. from us. After the collision, we lowered our foresail and headed in shore under a jib, but as much down the beach as in shore. We stood so for 10 or 15 minutes; then we set a color in the rigging for a steamboat.

How far distant from the shore did the Brothers sink?

(Objected to by lib'ts' counsel.)

About 1 mile and $\frac{1}{4}$ from the shore.

What was the state of the water that morning as to roughness?

144 It was smooth. It was smooth where we collided. No sea.

The collision occurred about 6 miles below Sandy Hook. The water was rough, if at all, about 8 or 10 miles from shore. It was, I think, between $\frac{3}{4}$ of an hour and an hour after the collision when the Brothers sunk.

At that time who owned the Huntley and in what proportions?

(Objected to by lib'ts' counsel as immaterial and irrelevant.)

Edmund Hammond, $\frac{3}{16}$; Samuel Hammond, $\frac{3}{16}$; Charles Gillette, $\frac{1}{8}$; Jacob Smith, $\frac{1}{8}$; Hiram Sell, $\frac{1}{8}$; Charles Price, $\frac{1}{8}$; Brewster Terry, $\frac{1}{16}$; Alfred Price, $\frac{1}{16}$.

At that time, or immediately proceeding the collision, what was the value of the Huntley?

(Objected to by lib'ts' counsel as immaterial and irrelevant.)

About 4,800 or 5,000 dollars.

Was she injured by that collision?

(Objected to by lib'ts' counsel as irrelevant and immaterial.)

She was.

To what extent, and how?

By carrying away her jibboom, bobstays, cutwater, part of the head, which caused us to take a steamboat. The expense of towing us up was $200, occasioned by this damage.

Can you now tell what was the expense of the repairs rendered

145 necessary by that collision?

(Objected to by lib'ts' counsel.)

No.

Can you tell very nearly?

I think I can.

How much?

Not far from $100.

In whose employ and under whose control was the schooner R. H. Huntley at the time of this collision?

(Objected to by lib'ts' counsel as calling for a legal inference or conclusion instead of a statement of fact.)

My own—mine.

Under what agreement?

Under an agreement with the owners. The agreement was for me to have the vessel to go with her where I pleased, in what trade, or do as I pleased with her. I had the sole charge and management of the vessel all the way thro. (This part of the answer objected to by lib'ts' counsel.) I was to victual and man her; pay half the port charges, and I was to have one-haft the nett freight after the port charges were taken out. The owners had the other half. I did the business of the vessel, and engaged her freights. I made up part of her accounts myself, and under my instructions some were made by Mr. Huntley, and some by John E. Mailler. I have seen the accounts that were intro-
146 duced in this trial and made up by John E. Mailler. They were made up under my instructions.

Do these accounts as made up correspond with your agreement with the owners of which you have spoken?

(Objected to by libellants' counsel.)

Yes, sir; they do.

Did the other owners, at any time after you took charge of the schooner Huntley, interfere with or attempt to control your management of that vessel?

(Objected to by lib'ts' counsel as irrelevant and immaterial.

No, sir; they did not.

Did you go master of her on every voyage she made?

I did not.

Who employed the master on board of her when you did not go master of her?

(Objected to by lib'ts' counsel as immaterial and irrelevant.)

I did.

How was he employed—by the month or on shares?

(Objected to by lib't's counsel as immaterial and irrelevant.)

By the month.

Who paid him?

(Same objection as last.)

I paid him out of my own funds.

Were the other owners aware that you employed another cap-
147 tain to sail this vessel at any time?

(Same objection as last.)

Not all of them; some of them might have known it; I don't know whether any of them knew it on that particular voyage; some of them knew it after she sailed, and while this captain was in her.

Was there any objection made by any of the other owners to your employing another captain?

(Same objection.)

No, sir; there was not. Another captain was employed on 2 different voyages.

What division was made of the earnings of these two voyages?

(Same objection.)

The earnings were divided just the same as if I had been aboard myself.

For whom was the Huntley built?

For me.

Do you know Captain Davy?

I know him and have had conversation with him.

Did you have a conversation with him at my office at any time, in which he spoke of the cause of this collision?

I did.

State that conversation.

I met Capt. Davy at Mr. Huntley's office, at Capt. Davy's request, thro Mr. Huntley, in regard to see about settling our collision; we
148 were talking about a settlement: I offered him $1,000 to withdraw the two suits; he said he would take $1,200 if Capt. Thorp would agree to it, and assume for the coal company's bill, and we agreed to meet at Capt. Thorp's office the next morning, which we did. We met there, and Capt. Thorp agreed to take the $1,200 with him. The time was appointed when the money should be paid; at that time the money was sent to New York to Mr. Huntley, to be paid over. Then we were talking about the collision, i. e., Captain Davy and myself, in presence of Mr. Charles Price and Mr. Huntley. I told him that "he had missed his calculations; he thought he had room enough to go clear of us." Captain Davy said "he did miss his calculation; he thought he had room enough to clear us;" then I told him he didn't admit that to me before; then he said "he always had admitted that;" I told him he didn't; he said "he did;" then Mr. Huntley interfered. This was after the agreement to take $1,200.

(It is admitted on both sides that there is a suit brought by the American Coal Company against the owners of the Huntley, who are the respondents in this suit, to recover the value of the cargo of coal on board the Brothers at the time of the collision.)

Adjourned to Dec. 2d, at 12 m.

149 DEC. 2D, 1862, 12 M.—Being cross-examined, the witness says:

When did you make your agreement for sailing the Huntley?

I made it the time we built her, or about the time we contracted for her?

Which of the owners did you make it with?

I don't know as it was with either one in particular.

Did you make a contract with any one; and, if so, whom?

I made the contract with John Price.

Where?

At Pachogue.

When?

In the year '51; I can't tell the date.

Was that contract in writing?

No, sir.

Are you acquainted with a custom among coasters, in pursuance of which a captain sails a vessel on shares, receiving a certain portion of the earnings as his wages for sailing the vessel?

(Question objected to, on the ground that it infers or draws a conclusion on the facts which it professes to contain, and that it is argumentative.)

I don't know anything about shares and wages.

Question repeated.

150 I do not know of any such custom, i. e., as wages and shares.

Did you ever know an instance of a captain sailing a vessel for his owners, and receiving his wages in the form of an interest in the vessel's earnings?

(Objected to as not general, and not proving a custom, and as irrelevant.)

No, sir.

Was your arrangement for sailing the Huntley within the usual custom of sailing vessels on shares, as practised in the port of New York, or among vessels owned in Patchogue?

New York I don't know anything about; but as to Pachogue, it was.

Was your arrangement for sailing the Huntley the same as that which is customary in Patchogue, in case of vessels having many owners?

Yes, sir.

By that custom, for whom does the captain sail the vessel?

(Objected to as calling for an inference & not a fact.)

He sails it for himself.

By that custom, who repairs the vessel?

(Objected to as calling for an answer not embraced within the issues, and does not relate to the trial of this cause.)

The captains generally have it done.

Who pays for the repairs?

151 The captain.

In the settlement between masters and owners is any part of such repairs charged to the owners?

I take them bills out of the earnings of the vessel before any settlement is made with the owners.

Is the same thing done in pursuance of the general custom you have referred to?

It is with us at Patchogue.

When you made your arrangement with John Price, was it not the whole of the agreement between you and him that you should sail the Huntley in pursuance of the Patchogue custom that you have refered to?

It was.

That custom is well understood among Patchogue owners of vessels generally, is it not?

I presume it is.

You are now sailing a vessel, are you not?

I am; the schooner S. C. Evans.

Who is the owner?

(Objected to as irrelevant.)

I am.

General or special?

I am the special owner.

Do you sail that vessel the same as you did the other?

Yes, sir.

In pursuance of the same custom?

Yes, sir.

152 Is she owned on Long Island?

Not all of her; partly owned on L. I. and partly here.

Who is an owner here?

Merrill and Abbott; I sail this vessel on the same terms as I did the Huntley.

Where are the books of the Huntley?

The Huntley's books of account are at Mailler and Lord's; I left them [them] there ever since this suit commenced.

Re-direct:

You have spoken of John Price; is he living or dead?

He is dead.

Did he own in the Huntley at the time she was built?

He did.

Previously to your sailing the Huntley, had you sailed other vessels owned in Patchogue on the same terms as you did her?

(Objected to as immaterial and leading.)

Yes, sir.

Re-cross:

State the name of one vessel?

"Hiram Gerard," schooner; John Price was one of the owners of the schooner "Hiram Gerard," Henry Ketcham was another.

153 What other vessel?

The schooner "William H. Mailler." I think William H. Mailler owned in her.

Another vessel besides those two?

No other. I sailed before that one vessel, the schooner "Charity," owned in Hempstead. Owned by a man by the name Smith. I think his name was Carman Smith.

SAMUEL H. HAMMOND.

Sworn to before me this 2d day of December, 1862.

EUGENE H. POMEROY,
Notary Public, New York City.

(Endorsed:) U. S. district court, 16, 36. Sam'l S. Thorp et als. against Sam'l S. Hammond and others. Testimony of Henry Gillitte, William Liscum, Charles Price, Charles L. Gillette, and Sam'l S. Hammond. R. H. Huntley, respond'ts att'r'y. Read in evidence, W. D. S.

154

155 JAN'Y 6, 1863.—For respondent's depositions, Henry Gillette, W'm Liscomb, Charles Price, Charles Z. Gillette, Samuel S. Hammond, Exhibit A.

Witness for respondents:

EUGENE H. POMEROY, (lawyer:)

Looks at paper A.

I think it is right. I made the calculations conformably.

(This paper is assumed correct unless some error is pointed out.)

Respondents rest.

Libellants resume.

HEZEKIAH SOPER sworn:

Been to sea 24 & 25 years, from cook to captain; been in fore-and-afters. Don't reef all sails at once, but one at a time. Dont know any custom of the sea dispensing with a lookout when reefing. Don't know of any custom that when a vessel is reefing she is entitled to the right of way, and other vessels in her vicinity must avoid her. Have run mostly to North Carolina.

Cross:

I have 6 men. Vessel 216 tons. When reefing I always have
156 a lookout stationed, unless I am whence I lookout myself. I then look out. I ussually am at helm. I constitute myself a lookout. I have a lookout stationed when I can't look out myself. Sometimes sail obstructs my view. Then I station a lookout.

JOB FALKENBURGH recalled:

Been to sea 25 years on this coast, in schooners, from Cape Henry to New York. I don't know of any custom that reefing vessels should have a lookout. Don't know of any custom that reefing vessels are entitled to right of way as against others; nor do I know of any custom requiring other vessels to give way to her when reefing.

Cross:

I mean that a vessel should always have a lookout. If vessel's close by, I should station a lookout where he could see while I was reefing. If I was at the helm I sh'd not deem it necessary if I could see ahead. Can't generally see very well ahead when reefing mainsail. I don't mean to say should always station a lookout. When I am at helm and reefing, I station a lookout. The place depends on the cargo.

157 Station him where he can see the best. If at the helm he can see, then he might be there. If wood on, he must be where he can see over it. I have been more in wood than coal trade. When several vessels are near, and one is reefing, we treat her as we do the rest.

When a vessel reefing, and I am in another vessel and on such a course that the reefing vessel must go about unless I change my course, I go about or keep away. Do this to avoid a collision. My duty is same as theirs to avoid a collision, and no more. Don't expect the same activity in tacking of a vessel reefing as one under full sail, knowing she had not same facility in tacking. I would not treat her as I would a vessel under full sail.

Re-direct:

Vessel reefing mainsail with jib set can keep a way better. Is manageable.

The fact that a vessel is reefing does not (excepted to) by custom of the seas prevent a vessel several hundred yards off from going about and crossing her bow, when there is room for the latter to go under her stern.

ELIJAH AUMACK:

Been to sea 15 years. Don't know of any custom giving the reefing vessel the right of way.

158 Don't know of any custom that requires other vessels to keep out of the way of her.

Don't know of any custom that excuses reefing vessel from lookout. Don't know of any custom requiring vessels to avoid another reefing mainsail merely.

Cross:

Did not station a lookout at all times when reefing in daytime. I have sailed in vessels where it always was done.

I do station a lookout when there is other vessels in the vicinity, and there is danger. Take the same precaution in lookout with coal and wood.

I know of no difference in treatment of reefing vessels than those met tacking.

RICH'D A. WOOD:

Been to sea in fore-and-aft vessels 12 y'rs. Been up and down coast ¾ of the time. Don't know any custom that vessels reefing need not have a lookout. Don't know of any custom that gives vessels reefing her mainsail right of way.

Cross:

Treat a vessel reefing same as any other, except in close contact
159 and certain circumstances. She has no right of way, if she can keep off, any more than my vessel. Haven't been to sea for 5 years.

If I was going to reef I would go forward and look out and put some one at the helm. Generally a lookout is stationed on vessels on the coast, reefing or no reefing. I know this by self-experience. I always did it myself. It was done also on board schooner Lenity in night—snow storm. Saw it done in the Ephraim Bowen, between Cape May and Barnegat Inlet—dark stormy day. I was steward. It was before dinner.

FREDERICK DAVEY:

I was master of the Brothers on voyage in question. Been to sea 15 years. Coasting schooners carry all kind of cargoes up and down the coast.

I don't know of any custom that allows vessel reefing to dispense with lookout, nor entitles her to right of way as against other vessels. None that requires an other vessel to keep out of her way.

I was on deck at collision at about 11 a. m. Huntley and Capes in sight. Clear weather. The wind nor-nor'west. Before we went about last, before collision, the Capes on our lee bow, standing in
160 in shore, she having tacked.

The Huntley was astern—5 to 600 yards astern—rather on the weather quarter. Just before we last tacked, we & Huntley were running on nearly parallel lines—parallel not more than 100 yards apart. We tacked to avoid collision with William Capes; this was necessary.

(Excepted to.)

There would have been no collision if the H. had ported her helm, and she could have cleared us by one or two spokes of the wheel.

After the collision Capt. Hammond run forward and s'd: "My God, why didn't you hallo? I did not see you." I said we did; and we did as loud as we could, and woke up a man in our vessel.

We went down along side of the Huntley, and in conversation he said he did not see us.

She could have kept of in twice her length. Collision occurred about two miles from the shore.

We went to the westward 3 or 400 yards, to list the out of water. We sunk while being towed toward shore. She towed us ½ mile towards shore. She could not be raised; we tried to get it
161 done but we could not. I was once in Mr. Huntley's office, and a conversation took place. Capt. Hammond and Mr. H. was present. It was for purposes of settlement and compromise. It was first stated that the conversation should not be used in evidence. I did not admit carelessness. I did say I expected to clear his vessel, and thought when I went about I could do it. The Brothers came about slower than usual, & the Huntley did not keep off as she ought to. The owners of the Brothers are properly stated in the libel.

Cross:

I distinctly remember that the conversation in Mr. Huntley's office should not be used. Mr. Huntley said it should not.

There was some warm words between Hammond and I, and Mr. H. said, "Never mind, this is all settled now." I did not suppose that it was settled, except the coal co. and the other owners of the Brothers owned it.

The last tack I made off shore before the collision, we were ¼ mile from Jersey shore and close to Huntley. Was 150 yards, should think, to the leeward of Huntley.

We went about 1st. Were about when she put her wheel
162 down. She was between us and the shore then. We passed to the leeward of her while she was standing on that tack. We passed her between 100 or 150 yards from her.

We was nearly abrest of her at the time of going about. She was on our beam. I mean after we got about. We put our helm down to go about, say 15 minutes after we passed her. This is as near as I can fix. I fix it from recollection as near as I can.

We had not been more than 5 minutes on that tack before we passed her. I should think we were heading about 3 points off the land.

I swore to the libel. It was read over to me.

We were heading N. E. by north. The Huntley was heading off about ½ a point more than we. We was going about 7 knots on that tack; Huntley about 6, I should think. The whole tack, 20 minutes.

The Capes was going a little faster than the Brothers. When we and Huntley tacked to stand off shore the Capes was to the leewad for us, ahead of us, and off shore, 6 or 700 yards ahead. She had two reefed mainsail, full foresail, & jib. She was standing up the beach, &
163 had been on it all the morning. Had not tacked. She stood on it about 15 min's.

I saw her when she tacked to stand in shore. At this time she was to eastward & northward of us, and 6 or 700 yards from us. As near as I can tell she bore about northeast by east from us at the time she tacked.

We were heading N. E. by N. We did not stand long in that direction after Capes went about—not more than 3, 4, or 5 minutes. After she tacked she still went a little faster than we. Can't say whether I saw the Huntley when the Capes went about. I saw her just before.

I rolled my wheel down. I could see partly the Huntley's deck. I did not notice her decks as we passed her. I saw her and had been in co. all the morning. I suppose she was reefing, her mainsail was down. I can't say how long before I rolled the wheel down I had seen her. I saw her at the time. I thought I could cross her bow. I supposed I could clear her. Capt. Hammond was the man who said he did not see us when he run forward. I might have been mistaken as we were all excited, but I think it was Capt. Hammond.

I hallood first after getting about. I observed that they did not keep away & holloed just as we had filled away. In about 3 m's after put helm down. All I know about man being waked by our hal-
164 looing, I heard him say so.

If we took in our mainsail we sh'd have gone 1 knot less. We were making about ½ point better course than the Huntley. Our leeway would be about the same, hers a little more.

We left our vessel, in the boat, the instant she sunk.

At the moment of hallooing she was heading so that I think she would have about struck our jibboom or bowsprit, if we had remained still. I don't think we had gone more than a length when she struck us after we filled away. Can't tell how far the Brothers shot ahead as she went about; she might 3 or 4 lengths; think she did.

It was dangerous to do anything but go about in order to clear the Capes. I expected to go to the windward of the Capes. I had done so before & expected to do so now.

It is not necessary to make calculations to clear a vessel at the distance of the Capes. I expected to wind her.

It is not customary to keep off under 3 full sails when the wind was blowing.

Where several vessels on the same tack & one reefing, it is not custom for the others to clear any more than if she was not reefing. If the man at the wheel can see, he is a lookout?

Brothers comes about slowly.

JAN'Y 7TH, for libellants. Deposition of Joseph B. Cranmer. (See nex. page.)

165 United States district court, southern district of New York.

SAMUEL S. THORP & OTHERS
against
SAMUEL S. HAMMOND & OTHERS.

Deposition of Joseph B. Cranmer, a witness produced on the part of the libellants, this 15th day of December, 1862.

I am a seafaring man. I began pretty early in life. I have had charge of a vessel about thirty-four years or a little over—schooners principally—in coasting trade between New York & Southern ports.

Q. Do you know of any custom among seagoing vessels and coasters, or either, in regard to keeping a lookout?

A. I know what my own rule is, and what the rule of all coasting vessels is.

Q. What is that rule?

Ans. The rule is, when you are sailing to look out ahead and to leeward for your own safety as well as that of others.

Q. Do you know of any exception to the rule you have stated?

Ans. I do not.

166 Q. Do you know of any exception in case of a vessel in the act of reefing?

(Objection as reaching in a circuitous manner and not a direct manner a result.)

Ans. I do not. I look out as much when reefing as when under way, and ought to look out more particularly when reefing.

Q. Do you know of any exception to the rule you have stated in the case of a vessel reefing or sailing in daytime and in clear weather?

(Same objection as last.)

Ans. I do not.

Q. Is there any custom at sea or among coasters regulating the way a vessel shall be treated by other vessels not reefing, sailing in company with her & and in the same general direction, she being in the act of reefing?

(Question withdrawn. Respondents' counsel objects to the withdrawal.)

Q. Do you know of any custom modifying or controlling the general rule you have stated as between vessels reefing and those not reefing?

(Objected to as seeking to prove a custom in a negative way.)

Ans. I do not.

Q. Do you know of any custom at sea or among coasters which relaxes the duties of vessels reefing in the matter of keeping a look-

167 out or otherwise?

(Same obj'n as last.)

Ans. I do not.

Q. Suppose three vessels—the Brothers, the Huntley, and the Capes—beating in from the port of New York, from 2 to 3 miles from the Jersey shore, the Huntley 600 yards astern, and on the weather quarter of the Brothers, the wind north-northwest, blowing fresh, the Capes 200 yards on the lee-bow of the Brothers; the Capes tacks in shore. What was the duty of Brothers and of Huntley?

(Objection as stating a case not within the proofs.)

Ans. I should say that the duty of the Brothers to tack ship, unless far enough to go to the windward, and would have a right to tack, of course. I should say that any sane man would go about before he would run into another vessel. I give you my rule. It is the way I do. I should suppose the Huntley ought to go to leeward of the Brothers; if the Huntley don't look out where she is going it is easy to go to leeward. I say it was the duty of the Huntley to go to the leeward. You might differ with me in opinion.

Q. Do you know of a custom prevailing in the port of New York whereby vessels are sailed on shares, as it is called?

168 Ans. Yes.

Q. According to that custom how are vessels sailed?

(Objected to as not within the proofs as to Patchogue custom.)

Ans. On a one-half share.

Q. What is that?

Ans. The captain victuals and mans the vessel, pays one-half the port charges; if anything is left it goes to the vessel.

Q. To whom do the earnings belong?

Ans. They belong to the owners.

Q. For whom does the captain sail the vessel?

(Objected to as calling for an inference & not a custom.

Ans. Sails it for the owners, of course. They make him an agent for the vessel.

Cross-examined:

In the case of the position of the three vessels stated to you, suppose the Capes has been standing in shore five minutes, and is in such position that the Brothers can keep away and go under her stern, while the Huntley is one point on the weather quarter of the Brothers, and is from 300 to 400 yards astern of the Brothers, with her mainsail on deck reefing, what then is the duty of the Brothers?

(Objected to by lib'l'ts' counsel as a case not within the proofs.)

Ans. If the Brothers was far enough astern to keep off safely,

169 I should think she ought to have gone under the Capes' stern.

Q. Why?

Ans. I don't suppose she wants to run afoul of her. She must either go about or keep away.

Question repeated. Why?

Ans. Well, in beating up the beach we usually try to keep as near the beach as possible on account of smooth water. I don't know how to answer your question altogether. I go by my own rule. If she was far enough astern to go to the leeward of the Capes in safety, and another vessel bearing down upon her, she ought, of course, to have gone to leeward. I suppose they are looking out for the other vessel the same as the one ahead. I don't know of any other reason.

Q. On the coast, when you discover a vessel in the act of reefing, and your course is such as will bring you near to her, do you treat her, and do you also also manage your own vessel, as you would if she were under full sail, instead of reefing?

Ans. I always look out and see which way they're going, and whether I can clear them.

Q. Why do you do this?

A. For my own safety as well as theirs.

Q. Are you now a master of a vessel, and do you sale her on shares and under the New York custom?

Ans. Yes. The vessel is the schooner "Richard A. Wood."

Q. In what trade are you employed?

Ans. I have been employed by government for the last eight months, but am now carrying hay and oats to Washington.

170 Q. Who makes the contract for the employment of your vessel?

Ans. I make it myself. I collect the money. I settle with one of the owners, and he pays the money over to the other owners.

Q. Why do you say that the master sails the vessel for the owners; and they make him an agent of the vessel?

Ans. I suppose the owners put confidence enough in the captain, or they would not put him in. If they believed him a grand rascal they would boot him out.

(Question repeated. Objection to the repetition for the reason the question is answered.)

He sails her for his own benefit, of course, and for the benefit of the owners. He goes where he pleases with the vessel.

JOSEPH B. CRANMER.

Sworn to before me the 15th Dec'r, 1862.

EUGENE H. POMEROY,
Notary Public, New York City.

(Endorsed:) U. S. dist. court. Samuel S. Thorp & o'rs ag'st Samuel S. Hammond & o'rs. Deposition Jos. B. Cranmer. (Original.) Benedict & Thorn for lib'ts; R. H. Huntley for resp'd'ts.

171 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Friday, the 26th day of June, in the year of our Lord eighteen hundred and sixty-three:

Present, the Honorable William D. Shipman, district judge.

SAMUEL S. THORP ET AL.
vs.
SAMUEL S. HAMMOND ET AL. } 16, 36.

This case having been heard on the pleadings and proofs, and argued by the advocates for the respective parties, and due deliberation being had in the premises,

It is now ordered, adjudged, and decreed by the court that the libel filed in this cause be dismissed with costs to be taxed against the libellants.

And it is further ordered that, unless an appeal be taken to this decree within the time limited and prescribed by the rules of this court, [that] the libellants pay into the registry of the court the amount of their stipulation for libellants' costs, and that the clerk distribute the proceeds in satisfaction of this decree.

(Signed) WM D. SHIPMAN, *Judge.*

(Indorsed:) Vol. 16, No. 36. United States district court for the southern district of New York. Samuel S. Thorp et als. vs. Samuel S.

Hammond et als. Benedict & Thorn, proctors for lib'ts; R. H. Huntley, proctor for resp'd'ts. Final decree dismissing libel with costs. Filed the 26th day of June, 1863.

173 U. S. district court.

SAMUEL S. THORP ET ALS.
vs.
SAMUEL S. HAMMOND ET ALS.

GENTLEMEN: Please to take notice that the above-named libellants appeal herein to the circuit court from the final decree of the district court in the above-entitled cause.

New York, Nov. 6th, 1863.

Y'rs, &c.,

BENEDICT & THORN,
Proctors for Appellants.

To GEO. F. BETTS, Esq., *Clerk*, &c.

R. H. HUNTLEY, Esq., *Proctor for Resp'd'ts.*

(Endorsed:) 16, 36. U. S. district court. Samuel S. Thorp et als., libellants & appellants, vs. Samuel S. Hammond et als., resp'd'ts. Notice of appeal. Geo. F. Betts, clerk. Benedict & Thorn, proctors for app'l'ts, 79 Cedar st. Filed Nov. 6th, 1863.

174

175 Circuit court of the United States, southern district of New York.

SAMUEL S. THORP, ISAAC O. THORP, JAMES W. OLSEN, Charles Harriman, Josiah M. Reeve, William J. Reeve, Emmor Reeve, John J. Chambers, George W. Cowperthwaite, Christian D. Emson, & Frederick Davey, libellants and appellants,
against
SAMUEL S. HAMMOND, EDMUND HAMMOND, Jacob Smith, Charles Gillette, Brewster Terry, Charles Price, Alfred Price, and Hiram Sell, respondents and appellees.

To the honorable the circuit court of the United States for the southern district of New York:

The appeal of the above-named appellants respectfully showeth that on or about the fifth day of March, 1860, the above-named libellants and appellants exhibited their libel in the district court of the United States for the southern district of New York against the respondents and appellees, praying, among other things, that the respondents might be adjudged to pay the libellants for the value of the schooner "Brothers," her tackle, &c., which was run into and sunk by the schooner "R. H. Huntley," which belonged at the time to respondents, and that
176 respondents might be condemned for the reasons set forth in said libel to pay a sum greater than fifty dollars, and each of said libellants in said libel mentioned claiming over fifty dollars, besides costs in said libel mentioned; that process issued out of said court having been served on the respondents, they did, on the eighth day of May, 1860, file their joint answer to said libel in said district court, praying that said libel might be dismissed, with their costs in that behalf, as by ref-

erence to said libel and said answer may more fully appear; that the said cause came on to be heard before the Hon. William D. Shipman, judge of said court, on or about the 19th, 20th, and 21st days of September, 1861, and on or about the sixth and seventh days of January, 1863, upon the depositions and proofs taken in said cause, and the testimony and proofs adduced by the respective parties; and said judge, having advised thereon, on the 26th day of June, 1863, made a decree in said cause whereby, among other things, it was decreed that said libel be dismissed, as by reference to said decree may more fully appear, the final decree therein being entered on the fifth day of November, 1863.

And these appellants insist that the said decrees are erroneous
177 inasmuch as the respondents were not entitled to a dismissal of said libel.

And these appellants, for these and other reasons, appeal from the whole of said decree to the next circuit court to be held in said district, and on said appeal they intend to make new allegations, and introduce the same and further proofs; and they pray that the record and proceedings may be returned to said circuit court, and that the said decree may be reversed, or such other decree thereon may be made as to said circuit court shall seem just, and that the appellees may be condemed to pay the appellants their costs and damages in the premises.

Dated November 5th, 1863.

BENEDICT & THORN, *Proctors.*
E. C. BENEDICT, *Advocate.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Abner Benedict, of the city of New York, being duly sworn, says that on the sixth day of November, 1863, he served a copy of the aforegoing appeal on R. H. Huntley, esqr., proctor for the appellees, by delivering the same to & leaving it with George Hamilton, who was at the
178 time in charge of said Huntley's office, No. Pine street, New York City, at about 11¾ o'clock a. m., said Huntley being then absent therefrom. Deponent further states that he is one of the proctors for the above-named appellants.

ABNER BENEDICT.

Sworn to before me this 6th day of November, 1863.

JOHN A. OSBORN,
U. S. Comm'r.

[Internal revenue stamp.]

(Endorsed:) 16, 36. U. S. circuit court. Samuel S. Thorp & o'rs, appellants, ag'st Samuel S. Hammond & o'rs, appellees. Appeal (5 aff't of service) to U. S. circuit c't. Benedict & Thorn, pr'ct's' app'l'ts. Filed Nov. 6th, 1863.

179 Circuit court of the United States of America for the southern district of New York, in the second circuit.

SAMUEL S. THORP ET AL., LIB'L'NTS, APPELlants,
vs.
SAMUEL S. HAMMOND & AL., RESP'D'TS, APpellees.
} Bond for costs.

Know all men by these presents that we, William H. Kenzel & Ba y

ard Hopkins, are held and firmly bound unto the above-named respondents & appellees in the sum of two hundred & fifty dollars, to be paid to the said respondents; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the tenth day of Nov'r, in the year of our Lord one thousand eight hundred and sixty-three.

Whereas the above-named libellants have prosecuted an appeal to the circuit court of the United States for the southern dist. of New York, in the second circuit, to reverse the decree rendered in the above-entitled suit by the judge of the district court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named libellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W'M H. KENZEL. [L. S.]
BAYARD HOPKINS. [L. S.]

Sealed and delivered, and taken and acknowledged, this 10 day of Nov., 1863, before me.

JOHN A. OSBORN,
U. S. Com'r.

180 UNITED STATES OF AMERICA,
Southern District of New York, ss:

William H. Kenzel & Bayard Hopkins, being duly sworn, each depose and say that he resides in the southern dist. of New York; that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

W'M H. KENZEL.
BAYARD HOPKINS.

Sworn to this 10th day of Nov., A. D. 1863, before me.

JOHN A. OSBORN,
U. S. Com'r.

(Indorsed:) U. S. circuit court. S. S. Thorp vs. Sam'l S. Hammond et al. Bond for costs on appeal. Filed 10 day of Nov., 1863.

181 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Saturday, the 26 day of May, in the year of our Lord one thousand eight hundred and sixty-six:

Present, the Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

SAM'L L. THORPE, LIB'L'TS & APP'L'TS,
v.
SAM'L S. HAMMOND & AL., RESP'D'T & APPELLEES.

The appeal in this cause from the dist. court coming on to be heard—
Mr. R. D. Benedict is heard on part of app'l'ts.
Mr. Huntley is heard on part of appellees.
Cur. adv. vult.

182

183 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall in the city of New York, on Saturday, the 1st day of June, in the year of our Lord one thousand eight hundred and sixty-seven:

Present, the Honorable Samuel Nelson, an associate justice of the Supreme Court of the United States.

SAMUEL S. THORP, ISAAC O. THORP, JAMES W. Olsen, Charles Harriman, Josiah M. Reeve, W'm J. Reeves, Edmond Reeves, John T. Chambers, Elias H. Chambers, Geo. W. Cowperthwaite, Christian D. Emsen, and Frederick Davey,

vs.

SAMUEL S. HAMMOND, EDMUND HAMMOND, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, A. Price, & Hiram Sell.

The appeal from the decree in the district court in the above-entitled cause coming on to be heard, and on hearing Mr. Benedict for the libellants & appellants, and Mr. Huntley for the defendants and respondents, and due consideration being had thereupon, it is ordered, adjudged, and decreed that the decree of the district court be, and the same is hereby, in all things affirmed, with costs to be taxed.

S. NELSON.

(Endorsed:) Filed June 1st, 1867.

184

185 Circuit court of the United States for the southern dist. of New York.

SAMUEL S. THORP, ISAAC O. THORPE, JA'S W. Olsin, Charles Harriman, Josiah M. Reeve, W'm J. Reeve, Edward Reeve, John T. Chambers, Elias H. Chambers, Geo. W. Copperthwaite, Christian D. Emsen, & Fred'k Davey,

vs.

SAMUEL S. HAMMOND, EDMUND HAMMOND, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, Hiram Sell.

To the honorable the Supreme Court of the United States:

The appeal of Samuel S. Thorpe, Isaac O. Thorp, James W. Olsen, Charles Harriman, Josiah M. Reeve, William J. Reeve, Edward Reeve, John T. Chambers, Elias H. Chambers, George W. Cowperthwaite, Christian D. Emson, & Frederick Davey, the above-named libellants and appellants, respectfully showeth that, on the 5th day of March, 1860, the above-named appellants filed their libel in the district court of the United States for the southern district of New York against Sam-

186 uel S. Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, & Hiram Sell, the above-named re-

spondents, for the recovery of damages alleged to have been sustained by them to the schooner "the Brothers and her cargo," all of which belonged to them, by collision in the bay of New York with the schooner "The R. H. Huntley," belonging to respondent; that thereupon respondents filed their answer to said libel, & the said libellants replied thereto, and such proceedings were had in said cause that, on the 26th day of June, 1863, a final decree was made and pronounced therein by said district court, wherein it was in substance adjudged that said libellants recover nothing, and that their libel be dismissed with costs; and that after such final decree your petitioners duly appealed therefrom to the circuit court of the United States for the southern dist. of New York. The said cause was removed thereby into said circuit court and there heard anew, and such proceedings were had in the said
187 circuit court that afterwards, on the 1st day of June, 1867, the said circuit court made a final decree in the said cause, whereby it was decreed that the said decree of the district court be in all things affirmed with costs; which said decree of said circuit court is, as these appellants are advised, erroneous, and ought to be reversed.

Wherefore these appellants appeal from the whole of said decree of said circuit court to the Supreme Court of the United States, and respectfully prays that the said decree of the said circuit court, and the libel, answer, pleadings, depositions, evidence, and proceedings in the said cause, may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court, and every part thereof, may be reversed, and a decree be made in favor of the said appellants, in conformity with the prayer in said libel contained,
188 with costs, or such other decree as to said Supreme Court should seem just.

Dated June 10, 1867.

BENEDICT & THORN,
Proctors for Appellants.

E. C. BENEDICT, *Advocate.*

(Endorsed:) U. S. circ't court. Samuel S. Thorp & al., appellants, v. Samuel S. Hammond et al., appellees. Petition of appeal. Benedict & Thorn, p. for app'l'nts. Filed June 11, 1867.

189 Circuit court of the U. S. of America, southern district of New York in the said southern district.

SAMUEL S. THORP, ISAAC O. THORP, JAMES W. OLSEN, CHARLES HARRIMAN, JOSIAH M. REEVE, WILLIAM J. REEVE, EMON REEVE, JOHN T. CHAMBERS, ELIAS H. CHAMBERS, GEORGE W. COWPERTHWAITE, CHRISTAIN D. EMSEN, FREDERICK DAVEY, libellants and appellants,
v.
SAMUEL S. HAMMOND, EDWARD HAMMOND, JACOB SMITH, CHARLES GILLETT, BREWSTER TERRY, CHARLES PRICE, ALFRED PRICE, & HIRAM SELL, resp'd'ts & appellees.

Know all men by these presents that we, Samuel S. Thorp, residing in the city of New York, and Bayard Hopkins, residing in the city of Brooklyn, are held and firmly bound unto Samuel S. Hammond, Ed-

mund Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, & Hiram Sell, in the sum of eight hundred
190 dollars, to be paid to the said appellees; for the payment of which, well & truly to be made, we bind ourselves and each of us, our & each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 18th day of June, 1857.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAM'L S. THORP. [L. S.]
BAYARD HOPKINS. [L. S.]

191 Sealed and delivered, and taken and acknowledged, this 18th day of June, 1867, before me.

R. E. STILWELL,
U. S. Com'r.

UNITED STATES OF AMERICA, *South'n Dist. of New York, ss:*

Samuel S. Thorp and Bayard Hopkins, being each duly sworn, deposes and says, and each for himself saith, that he is worth sixteen hundred dollars over and above all his just debts and liabilities.

SAM'L S. THORP.
BAYARD HOPKINS.

Sworn to this 18th day of June, 1867.

R. E. STILWELL,
U. S. Com'r.

I approve the above bond and the sufficiency of sureties thereto. June 19th, 1867.

SAM'L BLATCHFORD,
U. S. District Judge.

192 (Endorsed:) Cir't court of the United States. Samuel S. Thorp and others v. Samuel S. Hammond & others, appellees. Bond on appeal. Filed June 19th, 1867.

193 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the 2d circuit.

To Samuel S. Hammond, Edmund Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, & Hiram :

Whereas Samuel S. Thorp, Isaac O. Thorp, James W. Olsen, Charles Harrison, Josiah M. Reeve, William J. Reeve, Edward Reeve, John T. Chambers, Elias H. Chambers, George W. Cowperthwaite, Christian D. Emson, & Frederick Davey have lately appealed to the Supreme

Court of the United States from the decree lately rendered in the circuit court of the United States for the southern district of New York, in the 2d circuit, made in favor of you, the said Samuel S. Hammond & others, the above-named respondents & appellees, and have filed the security as required by law:

You are therefore hereby cited to appear before the said Su-
194 preme Court, in the city of Washington, on the first Monday of December, 1867, to do and receive what may appertain to justice in the premises.

Given under my hands, in the city of New York, in the southern district of New York, in the 2d circuit, this 19th day of June, 1867.

SAM'L BLATCHFORD.

(Endorsed:) Circuit court of the United States. Samuel S. Thorp & others, appellants, vs. Samuel S. Hammond & others, appellees. Citation.

Due and personal service of the within citation on the respondents & appellees is hereby admitted.

Oct. 25, 1867.

R. H. HUNTLEY,
Pr. f'r Resp'd'ts & Appellees.

Filed Nov. 1st, 1867.

195 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 194, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Samuel S. Thorp et al., lib'lt's & appellants, against Samuel S. Hammond et al., cla'm'ts & appellees, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 7th day of Nov'r, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

(Indorsement on cover:) No. 409. Samuel S. Thorp et al., appellants, vs. Samuel S. Hammond et al. S. New York C. C. U S.

Filed 27th December, 1869.

mund Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, & Hiram Sell, in the sum of eight hundred
190 dollars, to be paid to the said appellees; for the payment of which, well & truly to be made, we bind ourselves and each of us, our & each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the 18th day of June, 1857.

Whereas the above-named appellants have prosecuted an appeal to the Supreme Court of the United States, at the city of Washington, in the District of Columbia, to reverse the decree rendered in the above suit by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above-named appellants shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

SAM'L S. THORP. [L. S.]
BAYARD HOPKINS. [L. S.]

191 Sealed and delivered, and taken and acknowledged, this 18th day of June, 1867, before me.

R. E. STILWELL,
U. S. Com'r.

UNITED STATES OF AMERICA, *South'n Dist. of New York, ss:*

Samuel S. Thorp and Bayard Hopkins, being each duly sworn, deposes and says, and each for himself saith, that he is worth sixteen hundred dollars over and above all his just debts and liabilities.

SAM'L S. THORP.
BAYARD HOPKINS.

Sworn to this 18th day of June, 1867.

R. E. STILWELL,
U. S. Com'r.

I approve the above bond and the sufficiency of sureties thereto. June 19th, 1867.

SAM'L BLATCHFORD,
U. S. District Judge.

192 (Endorsed:) Cir't court of the United States. Samuel S. Thorp and others v. Samuel S. Hammond & others, appellees. Bond on appeal. Filed June 19th, 1867.

193 By the Honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the 2d circuit.

To Samuel S. Hammond, Edmund Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Price, Alfred Price, & Hiram :

Whereas Samuel S. Thorp, Isaac O. Thorp, James W. Olsen, Charles Harrison, Josiah M. Reeve, William J. Reeve, Edward Reeve, John T. Chambers, Elias H. Chambers, George W. Cowperthwaite, Christian D. Emson, & Frederick Davey have lately appealed to the Supreme

Court of the United States from the decree lately rendered in the circuit court of the United States for the southern district of New York, in the 2d circuit, made in favor of you, the said Samuel S. Hammond & others, the above-named respondents & appellees, and have filed the security as required by law:

You are therefore hereby cited to appear before the said Su-
194 preme Court, in the city of Washington, on the first Monday of December, 1867, to do and receive what may appertain to justice in the premises.

Given under my hands, in the city of New York, in the southern district of New York, in the 2d circuit, this 19th day of June, 1867.

SAM'L BLATCHFORD.

(Endorsed:) Circuit court of the United States. Samuel S. Thorp & others, appellants, vs. Samuel S. Hammond & others, appellees. Citation.

Due and personal service of the within citation on the respondents & appellees is hereby admitted.

Oct. 25, 1867.

R. H. HUNTLEY,
Pr. f'r Resp'd'ts & Appellees.

Filed Nov. 1st, 1867.

195 UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to 194, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of Samuel S. Thorp et al., lib'lt's & appellants, against Samuel S. Hammond et al., cla'm'ts & appellees, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this 7th day of Nov'r, in the year of our Lord one thousand eight hundred and sixty-seven, and of the independence of the said United States the ninety-second.

[SEAL.] KENNETH G. WHITE, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

(Indorsement on cover:) No. 409. Samuel S. Thorp et al., appellants, vs. Samuel S. Hammond et al. S. New York C. C. U S.

Filed 27th December, 1869.

HOWARD & STOVER, LAW PRINTERS,
42 & 44 NASSAU STREET, N. Y.

Supreme Court of the United States.

SAMUEL S. THORP *et al.*,
Appellants,

against

SAMUEL S. HAMMOND *et al.*,
Appellees.

Points of Appellants.

STATEMENT.

ABOUT 11 o'clock A. M. (*fol.* 143), on February 12th, 1860, the schooner *Brothers*, owned by the appellants, deeply laden with 440 tons of coal, and bound for New York, while in the vicinity of the Highlands of Neversink, 5 miles off (*fol.* 86), and while closehauled was run into and sunk by the schooner *R. H. Huntly*, a smaller vessel bound also on a voyage to New York, and, shortly prior to the collision, running on a course in the same general direction with the *Brothers*, but behind her (*fol.* 105).

At the time she was sunk, the *Brothers* was off the Jersey shore, about two miles (*fol.* 106), and she went down in six or seven fathoms of water (*fols.* 109).

The circumstances of the collision are very fairly stated in the libel (*fol.* 2 *to* 6 *of Printed Record*).

That statement is substantially as follows: viz.: That about 8 o'clock A. M. of February 12th, 1860, the *Brothers* had arrived within about eighteen miles of the Highlands of Neversink, on her voyage to the port of New York, and was running closehauled on a course a little east of north, but a short distance from the shore (*fol.* 60) The *Huntly*, a smaller vessel, and equally heavily laden, was running at the same time bound for the port of New York, in the same general direction, but a little further from the shore, and in advance of the *Brothers*. A third schooner, the *William Capes*, heavily laden with wood, was running in the same general direction, bound for the port of New York, and a quarter of a mile ahead of the *Huntly*.

The said three schooners were sailing in that way from about 8 o'clock A. M. until 9 o'clock A. M. the wind being northwest, and blowing freshly. That about 9 o'clock A. M. the wind shifted more to the north, viz., N. N. W. and increasing in force (*fol.* 86), both the *Brothers* and the *Huntly* clewed down their foretopsails, and falling off a little from the land, sailed on an offshore tack a little to the east of their former course, on which they ran about two miles. Then the *Huntly* stood about and ran in for land. The *Brothers* in order to avoid a collision also stood about, in for land (*fol.* 61). The *Huntly* at that time being about 200 yards distant, and passing the *Brothers* to the windward when about a one-fourth of a mile from the shore, both the *Huntly* and the *Brothers* went about, to stand offshore. Then the *Huntly* began to lower and reef her mainsail. The *Brothers* passed the *Huntly* to the leeward, under three full sails, close to the wind. The *Brothers* proceeded on her offshore tack, until she

reached the heavy sea, which was running about two miles from land (*fols.* 86, 95), and she beat out her tack, when she met the schooner *William Capes* who had just turned about from an off to an inshore tack. To avoid a collision with her, and also the heavy sea and wind offshore, the *Brothers* also came about, to stand in. At that time (*fol.* 90), the *Huntly* was one point off the weather quarter of the *Brothers* and about 600 yards astern of her (*fols.* 61, 72, 76, 88, 105). Immediately after the *Brothers* had come about, and before she had gathered sufficient headway to be manageable (*fol.* 105), the *Huntly*, going five knots an hour (*fol.* 74), carelessly, negligently and wrongfully ran into the *Brothers*, striking the latter on her larboard quarter, about six feet forward of the cabin house (*fol.* 105), with such force that she sunk in about twenty minutes, &c., &c. * * * During all the time the *Huntly* was beating out her long offshore tack, being one on which she was when the collision occurred, all hands on board of her were occupied in reefing the mainsail, and she had no one on the lookout, from the lowering her mainsail until she ran into the *Brothers*, and the *Huntly* took no steps to avoid the *Brothers* until the *Huntly* was directly upon her (*fol.* 105), and it was too late to keep off or come about. The collision occurred from the negligence of those on the *Huntly*, in running directly towards the *Brothers*, instead of coming about or keeping off to avoid her (*fol.* 53), and in not seeing the *Brothers* long enough before the collision to allow her to come about, or to keep off (*fols.* 105, 106), and in not keeping a proper lookout (*fol.* 106), and in not having sufficient men on board to manage the said vessel safely and prudently.

The owners of the *Brothers* commenced suit *in personam* against the general owners of the *Huntly*. The latter set up these defenses:

Firstly. That the parties sued as owners of the ves-

sel, were in fact, only general owners of the said vessel; and that at the time of the collision the said vessel was commanded, sailed, and exclusively managed by the respondent, Samuel S. Hammond, under and by virtue of an agreement made between him and the general owners, to the effect that he, Hammond, was to have entire control and management of the said schooner, as charterer on and for his own account, by means of which he became and was the owner *pro hac vice* of said schooner at the time of the collision, and alone responsible for the consequences thereof.

Secondly. That the entire value of the *R. H. Huntly* did not exceed $5,000, and her freight was $424. She was also damaged $350.

Thirdly. On the merits that the *Brothers* was in fault herself.

1. In not beating out her tack.

2. In improperly turning about when the *Capes* turned about, whereby, with a slight variation of her helm, she could have easily passed under the stern of the *Capes.*

3. That when the *Brothers* turned about on the inshore tack its direction was across the *Huntly's* bow. She knew full well, that the *Huntly's* crew were engaged in reefing her mainsail, by reason of which she was in a crippled condition, and the *Brothers,* in utter disregard of the rights and condition of the *Huntly,* placed herself in such a position as to render a collision inevitable.

The cause was tried before Judge SHIPMAN, holding the District Court in New York, and in 1863 he dis-

missed the libel with costs, on the ground that the respondents were general owners of the *R. H. Huntly*, and not responsible for the damages sustained while being navigated in the exclusive control of one of said owners.

On appeal, the cause was affirmed by Justice NELSON, sitting at Circuit in June, 1867, on the same ground. Appeal is now taken to this Court.

POINTS.

I.

As a matter of fact, we respectfully submit, that the evidence in the transcript of the record fails to show, that the vessel was so much under the exclusive control of Hammond as to relieve the general owners from their liability for the negligent navigation of the master and crew, as set up in the defendant's answer below (*fol.* 26). On that point:

1*st*. *Witness was John E. Mailler* (*fol.* 37). He made up the accounts of the *R. H. Huntly*. The defendant Hammond, sailed her on shares. Witness knew that said Hammond paid the crew—victualling (*fol.* 38); witness pays to some of the owners their dividends This witness identifies two accounts (*fols.* 55 *to* 60, *pp.* 19 *and* 20), which shows the sailing to be on joint account of owners and master.

2*d*. *Witness was Wm. H. Mailler:* Knows that

the schooner *Huntly* was sailed on shares. The captain paid for the manning and victualing, one-half port charges, and received one half gross earnings. Captain had entire control of the vessel, and could go where he pleased; knows of no restriction. Master controlled matters on board, and of course controlled business of vessel. *All this he knew from the way the account was made up* (*fol.* 38). The captain *had no other compensation than his share.* Masters generally select their own crews.

3*rd*. *Hiram Ketchum*, was originally an owner in the *Huntly*. She was built for Hammond to command her. The terms were *he was to sail her on shares*, victual and man her, and pay one half of the port charges and *divide net profits* after deducting one half of our port charges. (fol. 43.) Captain had absolute control of her. This witness proves that he was not an owner in her for 3 or 4 years prior to the time of collision. Witness never interfered or knew any owner to do so; *but the owners could have terminated the contract at any time.*

☞ It was not *limited as to time* (*fol.* 44).

4*th*. Charles Price, one of the owners, who was also a defendant, was also examined and testified that before the *Huntly* went out of Port Jefferson Harbor, where she was built he told Captain Hammond *to do with his part* ($\frac{1}{8}$*th*) *the same as with his own.* This would amount to an agency, see *Bidenlac agt. Smith*, 31 N. Y. R. 259. Captain Hammond sailed the vessel on shares. He does not know whether the owners ever

gave Captain Hammond any directions as to where he should sail the vessel or the manner of sailing her (*fol.* 128).

On cross-examination. He said that Captain Hammond *received as his compensation for sailing the vessel* ½ of her earnings (*fol.* 128). He said Captain did not sail her for any given period. This vessel was sailed on shares, in the same way that vessels at Patchogue, Long Island, are usually sailed. The owners were Long Island men (*fol.* 130). He knows of no other agreement than what he has stated.

5th. Charles Gillett (*fol.* 131), also one¡ of the owners (⅛ owner), describes the *R. H. Huntly* as having been built between 1851 and 1852. *At that time* there was an arrangement as to who was to sail her. This was between S. Hammond and other owners. The witness describes the arrangement to be thus—an acquaintance spoke to him and said: "we are going to build a vessel for Samuel Hammond, have you a mind to take a share?" Captain Edmund Hammond said: "I have got ¼ of her, will you take an ⅛th." Witness told him he would. At same time witness asked him if he was to sail the vessel the same as we did (*i. e.*, Captain Edward Hammond and the witness). He said, yes;—we were both sailing vessels at that time. * * * Captain Hammond was to pay the owners *one-half of the net earnings* of the vessel after paying the port charges. He was to pay that half for the use of the vessel, or income, or interest. Captain Hammond victualled and manned her. Captain Hammond paid for the crew (*fol.* 132). Captain Ham-

mond had a *carte blanche* to go where he liked and engage in whatever trade he liked.

All of the foregoing testimony was objected to by the libellant's counsel.

P. S.—It will be seen that this witness does not say that that arrangement was in existence in 1860, at the time of this collision. On cross-examination, however, this witness states that the *Huntly* was sailed in the same way during all the time he owned in her (*fol.* 134), but *he was not present* when the arrangement was made with the other owners (*fol.* 134), and the conversation which is before detailed constitutes all the arrangement that was made. *The vessel, however, was sailed the same way by Captain Hammond as vessels usually are by captains who receive one-half of the earnings* (*fol.* 135). The witness then describes what is meant *by sailing on shares*—viz: the captain has to victual and man the vessel, paying the owners one-half of net freights after deducting ship-chandlery, sail-maker's, blacksmith's bills, &c. (*fol.* 137); and where there are many owners, and the captains sail the vessels, the captains generally get their own freights, go on whatever voyage they choose, and control the vessels' business, and such was substantially the *Huntly's* condition (*fol.* 138).

6*th*. Samuel S. Hammond testified that he sailed the *Huntly* under an agreement for him to have the vessel, go with her where he pleased, in whatsoever trade he wished, or to do what he pleased with her. He had the sole charge and management of the vessel. He was to victual and man her, pay half the port

charges, and to have one-half the net freights after they were taken out. *The owners had the other half.* He did the business and engaged her freights. The accounts read in evidence were so made up, and correspond with that agreement. The other owners did not interfere or control the management of the vessel while he was on board (*fol.* 146). On two occasions he employed a sailing master for the voyage, and paid him (*fol.* 146), and on those two voyages the earnings were divided same way. On cross-examination, he says his *contract for sailing the vessel was not in writing*, nor can he specify any other owner he made it with, excepting Mr. Price (since deceased), (*fol.* 149). This agreement was made in 1851. He says the custom he sailed the vessel on was the Patchogue custom, which in substance was what he before stated (*fol.* 150).

7*th*. Joseph B. Cranmer, an old coaster of thirty-four years' standing, describes (*fol.* 168) the custom in New York of sailing vessels on shares. The captain sails on a half share, victuals and mans the vessel—pays one-half the port charges. If anything is left it goes to the vessel. *The earnings belong to the owner.* The captain sails the vessel for the owners. They make him their agent for that purpose (*fol.* 168).

The foregoing is a summary of all the evidence on this point in the transcript of the record, and we submit under it, as a matter of law, that the vessel in question, the *R. H. Huntly*, was, in point of fact, actually at the time of the collision

running in the service of the general owners on a contract or employment of the master, Hammond, who was a part owner, which made it,

1. A joint adventure, in which Samuel Hammond and the general owners were jointly interested.

2. In which Samuel Hammond's compensation was measured by a share of the profits instead of a stated stipend per month or season.

The allegation that the possession of S. S. Hammond was an exclusive possession, is qualified by the general principle, that the possession of one owner is the possession of all.

Ex. P. Machel, 1 *Rose*, 447; 2 *V. & B.*, 216.

II.

UNDER THE LOCAL LAW OF NEW YORK UNDER SUCH AN ARRANGEMENT, THE GENERAL OWNERS (THE VARIOUS APPELLEES), WERE RESPONSIBLE FOR THE ENGAGEMENTS AND MISFEASANCES OF THE MASTER, HAMMOND.

Saxton agt. *Read. Lalors' Supplement to Hill and Denio. N. Y. Reps., p.* 323, *is directly in point.*

In this case, the Court lay great stress on the fact, that the *business of the vessel was carried on for the benefit and advantage of the general owners,*

and it is but reasonable they should bear the expense, and incur the risks of employers.

In *Kenzel* agt. *Kirk* (37 *Barbour's N. Y. Reps., p.* 113), the Court held, that *a letting on shares* did not constitute a chartering of the vessel as to relieve the general owners from responsibility; but on the contrary, in a case very much like the present, considered the running to be on joint account of master and owners.

This case was affirmed on appeal by the Court of Appeals of New York, and is reported in 36 *Howard's N. Y. Practice Reps., p.* 269, and it is there laid down, that the proof that the vessel was "*run on shares,*" is not of itself, sufficient to discharge the general owners from responsibility. The real question is, who, by *the charter party*, has sole possession, command and navigation of the ship *as owner*. In many cases "*running* on shares" is a *method of determining* the amount of the master's compensation as such.

In *McCready* agt. *Thorne* (49 *Barbour's N. Y. Supreme Court Repts., p.* 438), the Supreme Court of New York held, that where a vessel is run by the master on shares, *it is not a chartering*, nor does the master become *owner for the time being.*

In *Basset* agt. *Crowell* (3 *Robertson's N. Y. Superior Court Reps., p.* 72), it is held, that *where one of several joint owners of a vessel sails her for the joint benefit of all, each receiving a share of the profits, all are liable for money advanced at the request of the owner sailing her, to pay her necessary expenses, such as port charges and the like.*

In *Vose* agt. *Cockroft* (45 *Barb. Sup. Court Reps. p.* 58), it was held, that where a master sailed a vessel on an arrangement like the case at bar, *but without any time fixed for the continuance of the agreement*, the general owners are liable for supplies, even though the creditors who furnished them, had knowledge of the agreement. In *Sayer* agt. *Nichols*, (1 *Daly's N. Y. Com. Pleas Reps., p.* 1), it is held, that such a contract is not to be regarded as a chartering of the vessel, but a mode of fixing the master's compensation, and the general owners are liable *in solido*.

Kohler agt. *Wright* (7 *Bosw. N. Y. Superior Court Reps., p.* 318), *is to same effect.*

The fact that the master takes the vessel on shares, does not imply that he has any control over her, and if not an action for freight may be maintained in the name of all the owners.

Sims agt. *Howard* (40 *Maine*, 276).

III.

Under the general admiralty law, by which it is presumed this Court will construe the liability sought to be charged upon the appellees, we submit that they are clearly liable to the appellants—assuming of course, that the injury in question was occasioned by the negligence of those navigating the *R. H. Huntly*.

1*st*. The Act of Congress of March 3rd, 1851, Sec. 3. 9th Stat. at Large, p. 635 in effect declares

such to be the responsibility of the general owners, to the extent of the value of the colliding vessel and its freight.

Construction has been given to this Section by

Walker agt. *Boston Insurance Co.*, 14 *Gray*, 288;
Allen agt. *Mackay*. 6 *Law Reps.*, 686;
Spring agt. *Haskel*, 14 *Gray's Rep.*, 309.

2*nd*. The fifth Section of the same Act provides that the *charterer or charterers* of any ship or vessel, in case he or they shall *man, victual and navigate* such vessel at *his or their own expense* or by his or their own procurement, shall be deemed the owner or owners of such vessel, within the meaning of this Act; and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof.

Hill agt. *Golden Gate*, 5 *A. m. L. R.* 142, 146, 147.

This section we respectfully submit does not apply to this case, for Samuel S. Hammond was not a charterer, nor did he navigate the Schooner *Huntly* at his *own expense*. The proof shows that he paid the crew and their victualing, but the port charges were divided, (*fol.* 55). The owners paid for the repairs, and the ship chandlery bills, *i. e.* they were taken out of their share of the gross earnings, (*fol.* 55). The earnings were, with these exceptions, divided, (*fol.* 56). He lacked several of the essential elements of a charterer.

1. He divided the freights.

2. He divided one-half of certain portions of the expenses of running, viz. port charges.

3. The owners paid the repairs and ship chandlery.

4. His running the vessel was for no specified time. It was at pleasure of owners.

5. Samuel S. Hammond was registered master of the Schooner *R. H. Hantly*, on her trips (*fol.* 139).

6. The accounts current between Samuel S. Hammond and his owners (*fols.* 55 to 59) conclusively shows that the running was a joint concern.

3rd. It is against the policy of the maritime law that these *secret* arrangements between a master and owners should qualify the maritime liability of the general owners to third parties.

To all the world the "master of a vessel" is the accredited and presumptive agent of the general owners in matters connected with the navigation of a vessel.

The Vrow Judith Volkrits, 1 *C. Rob.* 151.
U. S. agt. *The Malek Adpel*, 2 *How. U.S. C. R. p.* 234, *Opinion.*
The Columbia Weeks, *Ibid.* 156

It should not be tolerated that a person, whether part owner or not, who navigates a vessel, ostensibly as her master, should be allowed to screen his general owners from liability under the pretence that he was in a

position, as to them, that would relieve them from general liability. As a general rule, the liability of the ship and the responsibility of the owners in such cases are convertible terms. The ship is not liable, if the owners are not responsible and *vice versa*.

Mr. Justice STORY says:—Where one or more of the part owners are by common consent employed in the general concerns of the ship, all the part owners are liable *in solido* for the debts properly incurred on the joint account (*Story on Part.*, *sec* 440), and that it will make no difference in respect to the liability of the owner (even though the master is not himself a part owner) that the master is, by private agreement, to have the entire ship to his own use for a specific period, and make all the repairs at his own expense, for such a private agreement cannot vary the rights of third persons.

The Druid Naoton, 1 *W. Rob.* 399.

This point could not have been raised under the pleadings, as they were in the District Court below.

The Commander-in-Chief, 1 *Wallace* 52.

IV.

The learned Judge in the District Court (SHIPMAN, D. J.), whilst he was of the opinion that under the act of Congress of March 3, 1851, Samuel S. Hammond was to be treated as the charterer of the

vessel in question, and therefore solely liable, yet dismissed the libel (*see Opinion annexed*) as against him on the ground that "in the libel he was "charged merely as a part owner, and not as the "charterer, wrong-doer, or active cause of the dis- "aster. His liability is placed by the libel, on the "same ground as that of the other owners, and "the suit must, therefore, succeed or fail as to all "the respondents." We submit that this was erroneous, because:

(*a.*) At common law, any number of tort feasors might be joined as defendants in the same action, at the suit of the party aggrieved, and a failure to inculpate any one or more of such parties, was not ground for nonsuit as to all.

Archb. Pl., 72;
1 *Chitty Pl.*, 99 (86) *and cases*;
Low agt. *Mumford*, 14 *Johns.*, 426.

(*b.*) In admiralty, parties who are injured by a collision have been allowed to maintain their libel *in rem*, and also their libel *in personam*, against different vessels and different persons doing the injury complained of. In these actions, some defendants have been discharged and others have been held,

Newell agt. *Norton*, 3 *Wall.*, 266, *opinion*;
Smith agt. *The Crede and Sampson*, 2 *Wall. p.* 485;
Chace agt. *Crary*, 24 *How., N. Y. Pr. Rep. p.* 159.

(*c*) Under the 5th section of the Act of 1851, if Samuel S. Hammond, be considered to be the charterer of the schooner *R. H. Huntly*, it was proper in the libel to call him owner, for

"the words of the Act are that he is "to be deemed to be the owner of such vessel."

V.

On the merits of the collision, the libellants were clearly entitled to recover.

It appears that there were together at, and just prior to the collision, three vessels, viz.: the schooner *William Capes*, laden with a cargo of wood, the schooner *Brothers*, and the schooner *R. H. Huntly*. These vessels were all bound for New York, and had been running closehauled prior to the collision, in the same general direction (*fols.* 105, 62). Their tacks carried them off shore about two miles (*fol.* 62). The long tack was to the northward and off the shore two miles. The wind was N. N. W. (*fol.* 104). The schooner *Capes* was ahead sailing in a northeasterly direction (*fol.* 104). The *Brothers* next, followed by the *Huntly* (*fols.* 104, 88). The weather was clear (*fol.* 106). The *Capes* went about on the short or inshore tack (*fol.* 85). It then became necessary for the *Brothers*, which was astern of the *Capes* about 200 (*fol.* 85, 167, 164) to 500 yards, (*fol.* 105), also to go about on same tack (*fol* 89). The *Brothers* had run out her tack also (*fol* 106). If she had not gone about, she would have run into the *Capes* (*fols*, 40, 61, 63, 89, 104, 160). It was proper for the *Brothers* to have gone about (*fols.* 164, 42). The *Huntly* was about 500 yards astern of the *Brothers*, on a parallel line with the *Brothers*, and a little in shore of her (*fols.* 61, 72, 105), at the time the latter went about to go in shore (*fol.* 105), and from 2 to

300 yards apart after the *Brothers*, had got (*fol.* 89) about (*fol.* 90). The *Huntly* was heading N. E. by N. (*fol.* 60). It then became the duty of the *Huntly* to have either gone likewise about, or to have, in some other way, avoided the *Brothers* (*fol.* 89). *The witnesses say that the Huntly could have avoided the Brothers by porting her helm* (*fol.* 63), *half a point* would have been enough (*fols.* 87, 63), which would have brought her under the stern of the two vessels. The *Brothers* after going about, could do nothing (*fol.* 89). The *Huntly* could have kept off by porting her helm, within 200 yards off (*fol.* 89), she had sufficient time in which to do it (*fol.* 99). It was the most proper maneuver for her to do as her mainsail was down, and she could go about (*fol.* 40). One of the witnesses give as a reason for this obligation on the part of the *Huntly*, that the *Brothers* was not bound to look out for a stern vessel, even if she was reefing (*fol.* 42). It appears further that with a wind N. W. there is a bad jumping sea, two miles off from shore (*fol.* 43). Instead of doing so, she ran into the *Brothers* striking her on the latter's port side aft of the main rigging (*fol.* 105). Those on the *Brothers* endeavored to save their vessel by again keeping off shore (*fol.* 96), so as to keep the wounded side as much as possible out of the water (*fol.* 60), but without effect. They set a signal for a tug. The *Jacob Bell* came up and endeavored to tow them, but without success (*fol.* 47), as the vessel in question sunk before they could get her out of deep water (*fol.* 97).

The collision appeared very plainly to have been the result of the negligence of those on the Huntly *in this respect*, viz.: all hands on board of her were engaged in lowering the mainsail and reefing it (*fols.*

51, 140), and were not keeping a proper lookout (*fols.* 52, 87, 106). The testimony of the master of the *Huntly*, in effect, shows that he had no proper lookout on his vessel (*fol.* 140). The master of the *Capes* observed the absence of a lookout on the *Huntly* at the time the *Brothers* went about (*fol.* 93). The master of the *Huntly* admitted to Captain Job Falkenburgh, that he was reefing, and did not see the *Brothers* (*fol.* 42). The mate of the *Huntly* admits he saw the *Brothers* 150 feet off, and sung out to captain to put wheel up (*fol.* 52). *See Davey's testimony* (*fol.* 160).

The *Huntly* was also guilty of fault in not turning about on the inshore tack, or, at all events, in not porting her helm and going in under the stern of the *Brothers* (*fol.* 63).

The collision took place about two miles off shore. The weather was clear (*fol.* 106.

The diagram at *fol.* 40 shows the position of the vessels just prior to the collision.

Where a vessel astern, in an open sea, and in good weather, is sailing faster than the one ahead, and pursuing the same direction, if both vessels are closehauled on the wind, the vessel astern, as a general rule, is bound to give way, or to adopt the necessary precautions to avoid a collision.

Whitridge agt. *Dill*, 23 *How.*, *p.* 448.

It is not an excuse for want of a proper lookout in the night, on waters much frequented by vessels, that all hands were employed in reefing, there being no unusual emergency; so held in cases of sailing vessels.

The Catherine agt. *Dickinson*, 17 *How.*, 170;
S. P. in *Whitridge* agt. *Dill*, 23 *How.*, 448.

VI.

The claimants endeavored to get rid of their obligation to properly manage their vessel, by proving

1*st*, That it was not the custom to have a lookout in the daytime (*fol.* 44), or while reefing (*fols.* 45, 46.)

2*d*. That it was the custom to keep out of the way of a vessel reefing, which latter was not (*fol.* 44) bound to look out for vessels in her vicinity (*fols.* 45, 49, 53).

This evidence was objected to by the appellant's counsel (*fols.* 98, 114, 115, 116, 119, 132), and we submit that both kinds of custom were inadmissible and were improper to control the general maritime law.

The libellants' witnesses, however, dissipated this idea of custom, the effect of which was to violate the Admiralty law.

Soper's testimony, fols. 155. 156;
Falkenburgh's testimony, fol. 156;
Annack's testimony, fol. 158;
Wood's testimony, fol. 158;
Davey's testimony, fol. 159;
Cranmer's testimony, fols. 165, 166.

Lastly,

We claim that the judgment should be reversed, and a decree entered of reference to ascertain the damages, and that the libellants be entitled to recover to the limit fixed by the statute (*Sec.* 3, *Act of March* 3, 1851, 9*th Statutes at Large*), against all the owners, or at all events against the defendant, Samuel S. Hammond.

D. McMAHON,
Of Counsel for Appellants.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

THORP and others
against
HAMMOND and others.

DECISION.

SHIPMAN.—The libellants, owners of the schooner *Brothers*, have brought this suit *in personam* against the respondents, Samuel S. Hammond, Edmund Hammond, Jacob Smith, Charles Gillett, Brewster Terry, Charles Pim, Alfred Pim and Hiram Sell, owners of the schooner *R. H. Huntly*, to recover damages suffered by the former in a collision with the latter off the Jersey shore, in February, 1860. The libel alleges unskillfulness and neglect in the management of the *Huntly*, as the cause of the collision. Samuel S. Hammond, the captain of the *Huntly*, was on board and had charge of her at the

time of the collision. He was a part owner. I think it is shown by the proofs that he had the exclusive possession and control of the *Huntly*, and that he manned, victualled, and navigated her at his own expense. Such being the case, he must be deemed a charterer, within the meaning of the Act of Congress, approved March 3, 1851, which exempts the owners from personal liability, and leaves the injured party to seek his remedy against the colliding vessel, and those who carelessly and unskillfully handled her.

Samuel S. Hammond, her captain, is sued merely as a part owner, and not as the charterer, wrong-doer, or active cause of the disaster. His liability is placed, by the libel, on the same ground as that of the other owners, and the suit must, therefore, stand or fail as to all the respondents. I think the statute a bar to the suit in this form.

Let a decree be entered accordingly, dismissing the libel with costs.

Supreme Court of the United States.

SAMUEL S. THORP, et al., *Appellants*, *vs.* SAMUEL S. HAMMOND, *Appellees.*	Supplemental points on question of jurisdiction.

In answer to the first point, respecting the loss of jurisdiction by this court, we say:

1. That the files of the office of the clerk of the Supreme Court show that the transcript of the record, duly certified to on the 7th day of December, 1867, by the clerk of the Circuit Court, was actually received by the clerk of this court on the 9th day of December, 1867, which was within the proper time; but as the clerk states to the present counsel for the appellants, the reasons why he did not file the same as of that date were that a bond for the clerk's costs, required by rule 10, did not accompany the transcript, and there being no name of any counsel of this court on the papers, he could not inform any one of the supposed defect. As soon as the clerk learned there was a counsel's name

presented to him he so notified such counsel, who immediately caused the bond to be filed, and at the subsequent term the cause was docketed, and has been on the calendar over two terms without any motion on the part of the appellee to dismiss.

2. Under the above facts we urge that the appellants did all they were called on to do, *to give this court jurisdiction*, *i. e.*, they made return of a transcript of the record of the court below, duly certified to by the clerk of the said court, to the clerk of this court, and filed same with the latter, on 9th December, 1867; but said clerk refused to mark same filed as of that date, or to docket the cause, because his bond for his fees, required by rule 10, was not at that time given him.

3. It was unfortunate for the *then* counsel for the appellants that he either was not aware of the necessity of such a bond, or was not informed that the clerk of the Supreme Court required such a bond as a condition precedent to docketing the cause.

4. As soon as the present counsel for the appellants was informed of the fact of the default, he immediately remedied it, and at the next term the cause was docketed with the full knowledge of the appellee, and it has been on the calendar ever since, viz: during terms of 1869 and 1870.

5. We do not propose in these points to say anything derogatory to the learned clerk of this court, who is well known for his uniform courtesy to the Bar practicing in this court; yet in this case we maintain that his refusal to mark the transcript filed, as of the term of its receipt, viz: December 9, 1867, and to docket the cause, cannot deprive this court of jurisdiction, or the appellants of their right of appeal.

A. Jurisdiction was obtained by this court by the return to the clerk of this court of the transcript duly certified, within two days after the return day of the citation, and by leaving same with him.

Sec 22, Judiciary act of 1789
1 Stat at Large 84 as
amended by act of

(a.) The omission to give him his fee bond for his costs, as required by rule 10, was a mere practice matter.

(b.) The appellants gave the regular bond on appeal to stay execution below; but unfortunately from inadvertence neglected to give the clerk's bond for fees, under rule 10.

In Seymour *vs.* Freer, 5 Wallace, p. 822, it is held that where through a mistake or accident no bond or a defective one has been filed, the court will not dismiss the appeal, except of failure to comply with an order to give the proper security within a reasonable time.

(c.) Now, this cause has been on the calendar for two years after such bond was given, yet the appellee has made no motion to dismiss the appeal.

In Dillingham *vs.* Skein, Hemp's Reps., p. 181, it was held that the want of an appeal bond does not affect the jurisdiction: *it is waived, if the party appear and do not object at the proper time.*

(d.) Where no appeal bond was given on a motion to dismiss, time will be given to give security for costs.

Anson *vs.* Blue R. R., 23 How, p. 1.

(e.) And a defective appeal bond may be supplied at any time before the case is finally acted on.

Deen *vs.* Hemphill, Hemp, p. 181.

B. Now the present transcript handed to the court, shows that it was filed on 27th December, 1869, yet in light of the above facts that is a clerical error, and this court can *ex mero motu* correct it.

In Woodward *vs.* Brown, 13 Peters, p. 1, it was held that a clerical error in the transcript of the record may be amended in the Appellate Court on the clerk's certificate without a certiorari.

A clerical mistake in the entry of judgment in error may also be amended, even at a subsequent term, the mandate not having been filed.

Bank of Kentucky *vs.* Wistar, 3 Peters, p. 431.

6. This court have the power, for the purposes of exact justice, to direct their clerk to reëndorse the transcript of the record returned in this court as filed of the exact time it was handed to the clerk, viz: December 9, 1867, which was in ample time.

D. McMAHON,
of Counsel for Appellants.

Kilbourne Tompkins, Printer, 16 Cedar Street, N.Y.

Supreme Court.

OF THE UNITED STATES.

SAMUEL S. THORP, ISAAC O. THORP, JAMES W. OLSIN, CHARLES HARRIMAN, JOSIAH M. REEVES, WILLIAM REEVES, EDWARD REEVES, JOHN T. CHAMBERS, ELIAS H. CHAMBERS, GEO. W. COPPERTHWAITE, CHRISTIAN D. EMSON and FREDERICK DAVEY.

against

SAMUEL S. HAMMOND, EDMUND HAMMOND, JACOB SMITH, CHARLES GILLETT, BREWSTER FERRY, CHARLES PRICE, ALFRED PRICE and HIRAM SELL.

Respondents' Brief.

FACTS.

This is an action in admiralty to recover for the loss of the schooner Brothers, sunk by a collision with the schooner R. H. Huntley, off the coast of New Jersey, February 12th, 1860.

On the morning of that day three schooners the R. H. Huntley, Brothers, and William Capes, all

heavily laden, the first two with coal, and the Capes with wood, were sailing along the New Jersey coast, on a course a little to the East of North, bound for the port of New York. The Brothers was sailing nearest to the shore, the Huntley a little further from the shore and a little in advance of the Brothers, and the Capes about a quarter of a mile ahead of the Huntley.

The three schooners kept on the same course, holding about the same positions relative to each other, from 8 o'clock in the morning until past 9, making about 8 knots an hour, the wind being north-west and blowing fresh. About 9 o'clock the wind shifted more to the North, and being about North north-west and increasing in force, the Brothers and Huntley clewed down their top-sails, and falling off a little from the land continued on, a little to the East of their former course.

After sailing some time on this course and being between two and three miles from the shore, (folios 51, 62 and 86 of printed record) both vessels came about and stood in for the land until they were within about an eighth of a mile from the shore, when they again tacked to stand up along the beach, (fols. 51 and 107).

While going in stays the Huntley lowered her mainsail to reef it, (fols. 51 and 90).

The Brothers continued standing on up the beach under three full sails, (fol, 91) heading about two points off the land, and passed to the leeward of the Huntley and within one hundred yards of her, (fols. 71, 90 and 108). The Huntley at that time was falling off from the wind, and making about five knots an hour. (fols, 91 and 110). The Brothers continued on her course about fifteen minutes, (fols. 107 and 141) at which time she had gone about two miles from the place of the last tacking, (Rogers testifies—fol. 107, that she was going seven or eight knots per

hour) and was from three quarters of a mile to a mile from shore, (fol. 141) and had just passed ahead and to the leeward of the Huntley. (fol. 109) and was from 200 to 300 yards ahead of her. (fol. 140) when the Brothers suddenly tacked to stand in shore placing herself directly under the lee-bow of the Hun ley, so that as soon as the Brothers was fairly about, and her sails filled away and before she had gathered headway, (fols. 94 and 105) she was struck by the Huntley on the larboard quarter, near the cabin house, by reason of which she soon sunk, and the cut-water and head-gear of the Huntley were carried away. (fols. 140 and 144). As the Huntley's main-sail was on deck, and she under head sails only, she could not go in stays on discovery that the Brothers had gone about, but she put her helm hard to port to keep off, and was in the act of keeping away when she struck the Brothers, (fol. 140).

About two minutes after the Brothers put down her helm to go about, and just as her sails were filling off, she commenced hallooing. (fol. 108). At the time when the Brothers last tacked to stand in shore, the Capes was standing across the bow of the Brothers on her in-shore tack, and had been standing in that direction for fully five minutes. (fol. 92). By a slight variation in the helm of the Broth ers, she would have passed under the stern of the Capes, and thus have avoided collision with the latter. (fols. 52 and 95).

The Huntley was in every respect well-manned, with a good crew and a full complement of men, all of whom including the master were at the time on deck, and engaged in the navigation of the vessel. (fols. 51, 53 and 142).

The above statement of facts is substantially admitted in the pleadings and in the evidence offered on the part of the libellants.

The R. H. Huntley was owned by the respondents, but for a long time before and at the time of the collision she was commanded, victualed, manned, sailed and exclusively managed by Samuel S Hammond. (fols. 131, 132, 43, 44, 128, 145, 146, 55, 56, 57, 58, 59, 37, 38, 39). The latter was not in the employ of the owners of the vessel, or under their control, but sailed the vessel on shares.

The petition of appeal from the order of the Circuit Court, affirming the order of the District Court herein, in favor of the respondents was filed June 11th, 1867. Citation was issued on the 19th of June, 1867, and the transcript of the record was filed in this Court, December 27th, 1869.

FIRST POINT.

The Court has no jurisdiction to entertain this appeal because the transcript of the record was not filed in this Court at the term next succeeding the appeal.

The appeal was taken in June, 1867, and the transcript of the record was filed in this Court, December 27th, 1869.

Steamer Virginia, *vs.* West et al. 19 Howard, 182.

In that case, it was held that "where appeal is taken "to this court, the transcript of the record must be "filed, and the case docketed at the term next succeeding the appeal."

Edmonson *vs.* Bloomshire, 7 Wall. 306.

Here it was held that "if it is apparent from the "record that this court has not acquired jurisdiction "of a case for want of proper appeal, or writ of error

"it will be dismissed, although neither party ask it;" and that "An appeal or writ of error which does "not bring to this Court a transcript of the record "before the expiration of the term to which it is re- "turnable, is no longer a valid appeal or writ;" that "if no transcript is filed in this Court at the term "next succeeding the allowance of the appeal, it has "lost its vitality as an appeal."

The same was held in the following cases:

The Lucy, 8 Wallace, 307.
Villabolos, *vs.* United States, 6 How. 81.
U. S., *vs.* Curry, 6 How. 106.
Mesa, *vs.* U. S., 2 Black. 721.
Castro, *vs.* United States 3 Wall. 46.

SECOND POINT.

The libellants cannot recover because they have sued the general owners of the colliding vessels *in personam*; whereas the vessel was not in their employ, was not managed or controlled by them, was not victualed or manned by them, and was not sailed by their agent, nor by a person in their employ.

I. Chas. L Gillette, one of the owners of the R. H. Huntley says, (folios 131 and 132): "Capt. Hammond was to pay the owners one half of the net earnings of the vessel after paying port charges. He was to pay that one half for the use of the vessel. * * * Capt. Hammond victualed and manned her: paid for the crew, he had a carte blanche to go where he liked and engage in whatever trade he liked. The general owners of the vessel had no control over Capt. Hammond as to his mode of navigating the vessel, or as to what voyage he should engage in." The testimony of Henry Ketchum, (folios 43–44) is

to the same effect, also that of Chas. Price, (folio 128), and of Capt. Hammond, (folios 145–146) and their testimony is not contradicted. The Huntley's accounts with Capt. Hammond for the 73d and 74th voyages (folios 55–59), also show on what terms the latter sailed the vessel. This collision occurred on the Huntley's 74th voyage, (folio 37). See also testimony on this point at folios 38–39.

Lyman *vs.* Redman, 23 Maine, 289.

In this case, it is held, that the captain must have the entire control and direction of the vessel, and the owner must surrender all control over it, in order to make the captain owner *pro hac vice*.

Hailet *vs.* The Columbian Ins. Co., 8 Johns. 272.

In this case the Court said: "The master of the "vessel was to be considered as owner *pro hac vice*, "for the voyage insured.

"There was a complete letting of the entire vessel "for the voyage. The master was to victual and "man her at his own cost. He had the whole man- "agement and control, and according to the prin- "ciple established or admitted in the case of Velleijo "*v.* Wheeler (Cowper, 142), McIntyre *v.* Bowne (1 "Johnson, 229), and James *v.* Jones (3 Esp. N. P., "27), the person having such an interest and author- "ity in the ship is regarded as the temporary owner.

"There is no doubt that the master's conduct was "fraudulent and amounted to barratry, provided "that barratry could be committed in the situation "in which he stood. But it appears to be perfectly "well settled, that if the master of the ship be at "the same time the owner, he cannot commit bar- "ratry, because barratry can only be committed by "the master or mariners in relation to the owner of "the ship."

McCabe *vs.* John Doe, owner of steamship Sarah Sands, 2 E. D. Smith, 64.

"This was an action for seaman's wages against "the owner, and the Court held, "that the suit was "not a proceeding *in rem*, to enforce against the ves- "sel a lien for seaman's wages; and that the plaintiff "was not entitled to recover, it appearing that he "had no contract with the owners, and that at the "time his services were rendered, they had chartered "the vessel to third persons, who undertook its ex- "clusive management without any connection with "the owners, except that one of the latter was in "their employ and paid by them as master."

Clendaniel *vs.* Tuckerman, 17 Barb. 184.

"The plaintiff sailed the schooner Pennsylvania, "of which he was master, under a contract with the "owners, by which he was to find the crew and pro- "visions, and pay for half the labor, port charges, "&c., and receive one half the net freight earned by "the schooner.

Held—That an action for freight and demurrage upon a bill of lading, signed by the plaintiff, was properly brought in his name.

The Court said: "The plaintiff, though not an "owner, had such a special property in the vessel as "enabled him to collect the freight. He was the "contracting party," &c.

Tuckerman *vs.* Brown, 17 Barb. 191.

This action was brought against the owners of the schooner Pennsylvania, for not delivering a cargo of coal.

For a statement of facts see the case last cited.

The plaintiffs were nonsuited upon the ground that the action should have been against the master

he being owner *pro hac vice*, and the party who contracted for the carriage of the goods. Upon appeal the Court by Harris J. said:

"The owner of a vessel is never made liable as "a carrier, merely by virtue of his ownership.

"*The vessel must also have been in his employment,* "so as to made him a party to the contract for "carriage. Thus, if the owner charter his vessel to "another, the charterer alone is liable. *The criterion* "*of liability, therefore, is not ownership but employment.* "The party who has the control of the vessel, and "in whose business it is engaged, is regarded as "owner *pro hac vice*, and as such is answerable to "the freighter. (3 Kent 138 & cases cited.)

"*Nor is it material to the question of liability whether* "*the owner of the vessel receive for its use a stipulated* "*sum, or a share of its earnings.* In either case, the "party who, by the contract with the owner, is entitled "to the possession, command and navigation of the "ship, and not the owner, is liable in an action for not "delivering goods. Cutler *v.* Winne (6 Pick. 335.) "cited in the opinion of the judge who tried the "case, is to this effect. (See also Thompson *v.* "Hamilton 12 Pick. 424; Taggard *v.* Loring 16 "Mass. 336; Reynolds *v.* Tappan 15 Id. 370 "Mantor *v.* Holmes 10 Metcalf 402.) The judg- "ment at the Circuit was right, and should be "affirmed."

Sherman *vs.* Fream, 30 Barb. 481.

This holds that where individuals take a steamboat from the general owner, and agree to pay the persons employed in navigating her and the expenses of running the boat, they are the owners for the time and responsible for negligence in her navigation.

So, if they receive the price of passage, freight &c., and have the direction and control of the boat,

if they by their contract charter the boat generally, they are owners in respect to liability for negligence in running her.

Baker *vs.* Huckins, 5 Gray, (Mass.) 596.

Here, it was held that:

"The general owners of a vessel are not liable "for stores furnished to the master to victual her, "while in his possession under a charter party for "a definite period, by which he has the entire man- "agement, and they are to pay for keeping her in "repair, and to receive a proportion of her earn- "ings."

Sproat *vs.* Donnell, 26 Maine, 185.

The hirer of a vessel on shares will be liable for goods shipped on freight, and used for the benefit of the vessel, and not the general owner.

Mantor *vs.* Holmes, 10 Metcalf 402.

Where the owners of the vessel have let her on shares, for a certain time to the master, who is to victual and man her, they cannot maintain an action for freight earned by the vessel during the time. Such action can be maintained by the master only.

Nash *vs.* Parker, 38 Maine, 489.

This case holds, that "the legal owner of a vessel "is not responsible for repairs made on her, at the "request of one having exclusive possession, control "and management of her."

Lincoln *vs.* Wright, 23 Penn. State Reports, 76.

In this case the Court said: "A person may be "the legal owner of a vessel, and have her registered

"in his name without being liable for supplies on "the order of the master: but the possession, control "and management of her, the right to direct her des- "tination and receive her earnings, will fix his res- "ponsibility, whether he had the legal title or not."

These are all decisions of State and Common Law Courts, but they profess to follow Admiralty rules, and are sustained by Federal and Admiralty Court decisions.

Webb *vs.* Peirce, 1 Curtis, C. C. 104.

In this case it was held that where a master hires a vessel "on shares" under an agreement to victual and man the vessel and employ her in such voyages as he thinks best, having thereby the entire possession, command and navigation of the vessel, and the relation of principal and agent not existing between the master and owners, the master thereby becomes the owner *pro hac vice* during such time as the contract exists, and he and not the general owner, is responsible for necessary supplies.

Thomas *vs.* Osborne, 19 Howard, U. S. 22

In this case, the Court, per CURTIS J. say:—

"But this mode of employing vessels is so "common and its terms and legal effect are so well "settled by long usage, it has been so often before "the courts and the subject of adjudication that no "embarrassment is felt by us concerning the terms "and conditions on which Leach took the vessel. "We understand from his testimony, as well as from "known usage, ascertained and adjudicated on in "the courts, that the master had the entire posses- "sion, command and navigation of the vessel; that "he was to employ her in such freighting voyages "as he saw fit; that he was to victual and man the

"vessel at his own expense; that the owners were "to keep the vessel in repair; that from the gross "earnings were to be deducted all port charges, "and the residue was to be divided into two equal "parts, one of which was to belong to the owners, "the other to the master; and that this agreement "could be terminated by the restoration of the "vessel to the owners by the master, or by their "intervention to displace him at the end of any "voyage, but not while conducting any one which "he had undertaken."

And the master was held to be the charterer, and special owner *pro hac vice*.

II. But aside from all decisions, the Statute, 9 U. S. Statutes at large 635, secs. 3 to 5, seems to set this matter entirely at rest, and conclusively to dispose of the question.

Section 5 is as follows: "The charterer or charterers of any ship or vessel, in case he or they shall man, victual and navigate such vessel at his or their own expense, or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of this act; and such vessel or vessels when so chartered, shall be liable in the same manner as if navigated by the owner or owners thereof."

THIRD POINT.

Although the charterer is made a party to the suit, yet he is so made, as one of several owners, and not as charterer or special owner. He is not sued because he had charge of the vessel, or because he controlled her, but because he happened to have an interest in her as a general owner.

Now as a general owner he is not liable; and as a special owner he is not sued.

No recovery can therefore be had against him in this action.

FOURTH POINT.

The authorities relied upon by the Appellants, and are generally of two classes.

Either those in which parties giving credit to the vessel on the order of the master, had no notice of the agreement between him and the owners and in consequence dealt with him as an agent.

Or, those in which liability was held to depend upon the question who had the possession, control and management of the vessel,—a mere question of fact depending on the circumstances.

Kensel *vs.* Kirk, (37 Barb. 113, and 32 Howard's N., Y. Pactice, 269).

This was an action brought against the general owners to recover a bill of supplies furnished on the credit of the vessel. By the contract the master was to pay one half of the disbursements, and to receive one half of the earnings. The defendants had no notice of any special arrangement between the master and owners, but on the contrary the owners had habitually paid, without objection, bills for repairs and supplies ordered by him, and seven eighths in value had expressed their willingness to pay the demand in question. They removed the master before the end of the voyage, without any objection on his part, and used the supplies furnished by the plaintiff.

Judgment was given for the plaintiff and was affirmed in the Court of Appeals, (32 Howard's Practice Reports 269.)

That Court sustained the test decisions in the Eastern States upon this question, saying by Peckham J.: "There is nothing in this testimony inconsistent with the right of the owners to direct how "and with what the vessel should be freighted, or at "what rate of compensation or value, or when she "should sail, or inconsistent with their rights to entire "control over her; the division of her earnings "being a mere mode of compensating the captain for "his services as their agent. * * * *On such facts* it is "impossible to say as a matter of law that the captain was the owner for the time, and *had possession "and exclusive control of the ship.* In the test cases "in Massachusetts, relied on by the Appellants, it is "held that each case must depend upon its peculiar "facts, as to whether the owners or the captain "has possession, command, and navigation of the "ship."

Saxton *vs.* Read, (Lalor's Supplement to Hill and Denio's Reports 323).

Upon the facts peculiar to this case the master was held not to be the owner *pro hac vice* and the general owners were held liable for supplies furnished upon the master's order, by one who *had no notice of the secret agreement between the parties.*

McCready *vs.* Thorne (49 Barb. N. Y., 438).

This case holds that the *mere* fact that the vessel is sailed "on shares" does not constitute a chartering.

The general owners were held liable, (1) because the indebtedness was incurred upon an express promise, by one of the owners, that the owners would be responsible for it; and (2) because the special contract between the master and owners was private.

Bassett *vs.* Crowell, (3 Robertson's N. Y., 72).

This case has no bearing upon the one at bar.

In deciding it, the Court said: "The evidence is "not that they (the owners) chartered the vessel to "Crowell, but that he was sailing her for the joint "benefit of all the partners, the defendants them- "selves included."

Vose *vs.* Cockroft, (45 Barb. N. Y., 58).

In this case, the written contract between the owners and the master contained this condition.

"In consideration of these services, and as wages "for himself the master shall receive one half of the "gross amount of freight &c."

Sager *vs.* Nichols, (1 Daly's N. Y., Com-Pleas 1).

Here, the agency of the master was not put in question, and the case had none of the features of that, at bar.

Kohler *vs.* Wright, 7 Bosworth, N. Y., 318

This is subject to the same remark.

Sims *vs.* Howard, 40 Maine 276.

This case holds that the *mere* fact, that the master takes the vessel on shares, does not *of itself* imply that he has *any control over her.*

Allen *vs.* Mackay, 1 Sprague 219 and 6 Law Reports 686.

In this there was no question of ownership or charter.

Hill *vs.* Golden Gate, 1 Newberry's Adm. 308.

This case merely holds that the liability for damages and contracts depends upon the question, who

has the exclusive possession, control and management of a vessel.

Spring *vs.* Haskell, 14 Gray 309.

This case determines the measure of damages where a master wrongfully sells his cargo in an intermediate port.

FIFTH POINT.

As to the suggestion that the Respondent, Samuel S. Hammond should be held solely liable in this action, it is sufficient to say that the libellants have not asked that such liability be decreed in either of the Courts below; no amendment has been suggested by them and they are here upon the same papers on which they originally based their claim.

See third point supra.

SIXTH POINT.

The libellants cannot recover, because they, and not the respondents, were guilty of the negligence which caused the collision.

I. The Brothers was under full sail and perfectly manageable, while the Huntley was under head sails only and was reefing, and in such position she was crippled, and was to be considered and treated as a favored vessel.

Richard Brewster—coast captain 19 years—says, (folio 45). "With me, and among masters with whom I have sailed, it is the settled custom to give a reefing

vessel the way and avoid her under all circumstances. If a vessel passes to leeward of me and goes by me she has no right to cross my bow except at her peril." Henry Gillette—9 years at sea and master of a vessel—testifies, (folios 113–114) that he knows it to be the custom for vessels under way to keep clear of vessels reefing and give way to them. Myron J. Cole—36 years at sea—(folio 44), Capt. Francis Jackson—master of coasters 8 years—(folio 45), Capt. Sylvanus Mott—25 years at sea—(folio 46), Geo. W. Brewster—master of vessel for 16 years—(folio 46), Benj. F. Jayne—coaster for 6 years—(same folio), Geo. E. Hawkins—master for 3 years, 10 years at sea—(same folio). Frederick Mervin—master and mate 4 years—(folio 49), all testify to the same effect.

(*a.*) The rule is that a vessel with a free wind is to avoid one on the wind; that a vessel propelled by steam, must avoid one propelled by wind &c.

But this rule does not obtain because one vessel is free, because one vessel is propelled by steam; but because having the wind free, or having steam she has the power (or is presumed to have) the more easily to avoid collision, and the law makes it her duty to exert that power.

The Osprey, 1 Sprague 245, 251, 254, 255.
The Steamer Oregon *vs.* Rocca, 18 How. 570.
The Pacific, 1 Newberry Adm., 29, and, cases cited.

"The general principle is, that the vessel having the advantage shall take all the burden of keeping out of the way. This principle governs all other cases of inequality, and should be applied to this also, unless there be some necessity for making this an exception."

The Osprey, *supra*, page 252, pr. Judge Sprague.

(*b.*) And if the better conditioned vessel does not take the proper precaution to avoid a collision, it is no excuse for her to say, that the other vessel might have avoided it. This principle is illustrated in the case of the Clermont, 2 Curtis. C. C. 363. which holds that:

"If two vessels are approaching each other on "converging courses, one having the wind two "points free, and the other close hauled, and a "collision occurs, the burden is on the former to "show that all possible care and skill were used "on her part, and that the collision was the fault "of the other vessel or was inevitable. It is not "enough that at the moment of collision the ves "sel having the wind free, used all possible ef- "forts to avoid or lessen the effects of collision: "previous precaution and foresight are required."

See also S. C. (The Clermont) 1 Sprague, 258.

II. The Brothers attempts to get out of the difficulty, in which these principles of law place her by alleging that she went about, 1st. because she had beaten out her tack; 2nd., because if she did not go about, she would have collided with the Capes: and 3d., because she had reached the rough sea, which rendered it proper for her to go about.

Now in the first place, she had not beaten out her tack; for she had stood up the beach on this tack (which was the long tack, and she was heading but two points off shore) but 15 to 20 minutes at longest, when she met the Capes standing in, and which latter vessel had been five minutes on her inshore tack: and as on the inshore tack the course was at right angles with the shore, the Capes had stood in $\frac{2}{3}$ of a mile, when the Brothers tacked; and had the Brothers stood on her course twenty minutes longer, she

would have made no greater offing than the Capes had made.

Prime estimates the time on the last tack as from 10 to 15 minutes, (folio 51). Rogers estimates it at 15 to 20 minutes, (folio 107), and Capt. Hammond estimates it at 10 or 15 minutes, (folio 141). Capt. Van Name of the Capes testifies, (folio 92) that his vessel had been about for 5 minutes when the Brothers put down her helm to go about.

In the second place, a collision with the Capes would have been the grossest carelessness; for 1st., Capt. Van Name (the Master of the Capes), swears that the Brothers could have gone under the Capes' stern (Folio 95), and indeed it is preposterous to deny it. 2nd., Captain Van Name swears that he was watching the movements of both the other vessels and that he was on the point of going about himself, when he noticed the Brothers tack; (Folio 85—question 20), (and it may be here parenthetically remarked that had the Brothers exerted any portion of the caution, that the Capes showed, no collision, would have occurred). And another remark may be made: viz. that Capt. Van Name's attention was particularly called to the manouevering of the two other vessels, and the question arises: what so particularly excited his attention? Not the bare fact that he must go about to avoid the Brothers; for he says he was apprehensive of a collision between the Brothers and the Huntley.

Why was he? The libellants say that at that time the Huntley was 600 yards from the Brothers and 800 yards from the Capes: this was near half a mile; and at this distance, why was Capt. Van Name apprehensive of a collision between the Brothers and the Huntley? The answer is plain; the Brothers had not kept away, to pass astern of him; and now, just as he is going

about to let her stand on, she tacks. But still the Huntley is 600 yards from the Brothers, why then fear a collision? He says because he saw no look out on the Huntley: but why did he search for a look out? If he had naturally expected the Huntley to keep off, why was he anxious about a look out? The truth must be, and is, that he knew that the Huntley had the right of way, and expected her to observe it, and if she did, he must see a collision imminent. But returning from this digression: In the third place the Brothers had not reached any such rough sea as rendered it proper for her to go about.

She was a large schooner, carrying 449 tons of coal, (see Libel) and bound from Alexandria to New York. She was then below the Highlands, with the Jersey Shore on the west, and Long Island on the north, with a whole sail breeze for her; for she had not reefed; with the wind off shore all night, and which had now changed to draw more down the beach, but which change had existed only from one to two hours; and she was at no time beyond two miles from the shore.

These facts alone show that the allegation of rough water, is a subterfuge; but the falsity of the position is still further shown by the evidence of several of the witnesses which clearly proves that the water was not rough at all.

Chas. H. Brewster testifies (folio 50) that he saw the Brothers sink and considered the water smooth at the time. Prine testifies (folio 52) that the water was smooth when the vessel sunk. Capt. Hammond testifies (folio 144) that the water was smooth where the collision occurred, and that it was not rough within 8 or 10 miles from the shore. Geo. W. Brewster testifies, (folio 46) that he sailed from Sandy Hook at 10 or 11 o'clock on the morning of the collision, saw the Brothers sink 80 rods from him and

that the water at the time was smooth or nearly so. Capt. Korner testifies to the same effect, (folio 47).

And besides, the steamboat which towed her appears to have had no difficulty in getting hold of her; nor the men any difficulty in saving themselves in their boat. The rough water statement is clearly false.

III. The excuses urged by the Brothers, then being swept away from her, she next seeks to throw the blame on the Huntley, because, as the libel alleges, she being 600 yards distant, could easily have avoided her; and with a proper lookout would have done so.

Now 1st. The Huntley was not 600 yards from the Brothers when the latter went about; and this is proved by the libellants' evidence. For the libellants' witnesses prove that it took the Brothers two minutes to go about, from the time she put her helm down till she gathered headway on the other tack. In this instance she had just got about, and had not gathered headway, when struck.

Van Name testifies, (fol. 94) that it was about two minutes after the Brothers put down her helm to go about, when she began to gather headway on the other tack, and that she was struck before she had gathered headway. Rogers testifies (folio 105) that the Brothers was struck immediately as she payed off, and that she had not gone far enough to get headway on her.

The Huntley was going four or five knots, say five knots; this would carry the Huntley 293 yards in two minutes. (Folios 89 and 91.)

The testimony of Milford Rogers, the mate of the Brothers is, that the Huntley and the Capes were equi-distant from the Brothers when the latter tacked. (Folio 105.)

Again, had the Huntley been 600 yards from the Brothers, and but one or even two points to the windward of her, she could not have reached her in that "heavy sea," nor in still water with nothing but head sails on. This is common sense, and it is also the testimony of Mr. Prine, the mate of the Huntley, and other witnesses. (Folio 52.)

And, again: Capt. Davey might have supposed the distance to be 600 yards, but he afterwards admitted that he miscalculated.

See the testimony of Capt. Hammond and Mr. Price. (Folios 148 and 126.)

Capt. Davey, of the Brothers, testifies (folio 163) that he saw the Huntley when he rolled the wheel down to come about, and thought he could cross her bow—supposed he could clear her.

1 Ben. 235—

But 2d, it is admitted that the Huntley had no lookout, specially stationed as such.

But does this admitted fact aid the libellants or prejudice the respondents?

1. Every man on board the Huntley was on deck, and each one consistent with his duties was a lookout.

John Prine, mate of the Huntley, testifies (folio 51) that the Huntley's crew were all engaged in reefing throughout the last tack, and that the Captain was at the wheel.

2. The Huntley was reefing, which act required all her men, and the Brothers knew it.

3. The Brothers passed within 100 yards of the Huntley, and knew her exact position, and knew how every man was employed on board of her. Even Capt. Van Name of the

Capes knew this, and he was still further distant.

Edward Decker, testifies (folio 71) that he saw the Brothers pass the Huntley close under the lee of the latter; and Milford Rogers testifies, (folio 108) that the Brothers passed within 100 yards of the Huntley on the last tack: Capt. Van Name, of the Capes, testifies (folio 87) that he knew the Huntley was reefing, and Capt. Davey himself says he supposed the Huntley was reefing as her mainsail was down, (folio 163).

4. The Huntley knew where each of the vessels in her company was. She was near the Jersey shore and feared no approach from that quarter. She knew the Brothers was acquainted with her position, and was under full sail and perfectly manageable. She knew that the Capes was where she could not reach her. She knew no other vessel was in her neighborhood. It was a clear day. And she knew that under such circumstances the customs and rules of the sea harmonized with common sense; and that under such a state of facts, a lookout could be of no utility whatever.

5. Among these customs, the first was that being a crippled vessel, all other vessels with plenty of sea room were bound to avoid her. And the second, "like unto the first," was that all vessels having advantage in sails or position were bound to avoid her, on the principle which has already been established, that the stronger is to give way to the weaker.

6. It appears to be customary under such circumstances not to keep a special lookout, and this custom the Brothers should have known.

Myron J. Cole—a seafaring man for 36 years—testifies (folio 44) that it is not the custom to have a man at the lookout in the daytime, and that a reefing vessel is not bound to look out for vessels in her vicinity. Capt. Richard Brewster—a coast captain for 19 years—testifies (folio 45) that it is not customary to have a lookout while reefing under the circumstances of the vessels in question. Capt. Francis Jackson—master of coasters 8 years (folio 45), Capt. Geo. W. Brewster—16 years a master, (folio 46), Benj. F. Jayne—coaster for 6 years—(same folio), William Liscum—at sea 21 years, master of vessel 15 years—(folio 119), Geo. E. Hawkins—master 3 years, at sea 10 years—(folio 46), Capt. Fred'k. Merwin—master and mate 4 years—(folio 49), Thomas B. Hawkins—master of coasting vessels 25 years—(same folio), Edmund N. Smith—master 14 years—(folio 50), Chas. L. Gillette—master 14 years—(folio 133) all concur in testifying that it is not customary for vessels to station a lookout while reefing.

> But if the principle that the stronger should give way to the weaker is admitted, such lookout was unnecessary in any case; until the Brothers proves that her suddenly going about in the manner she did, was not the cause of the collision, and this she has not attempted to do.

"Generally, if a collision has happened, and one "vessel has been guilty of some negligence, *the* "*burden is on her to prove that this negligence was not* "*the cause of the collision.*"

> Clapp *vs.* Young, 6 Law Reporter, 111, S. C. Nom. Schr. Lion, 1 Sprague, 40–44.
> Steamtug William Young, Olcott, 41, 42.
> Steam Ferryboat Relief, id. 107.
> The Columbus, Abb. Adm. 388.
> The Brig Emily, Olcott, 132, affirmed, 1 Blatch. 236.
> 1 Parsons, Maritime Law, 191, 192.

The Steamboat Anglo-Norman, 1 Newbury, Ad. 494.
The Bellville, id. 500.
The Pacific, id. 28, 29.

"Nor is it enough to show that the collision "could not have been prevented at the moment, if "it might have been by previous precautions."

1 Parsons, Mar. Law, 192, and cases cited.
The Steamboat New York *vs.* Rea, 18 How. 223, 224.
The Clermont, 2 Curtis, C. C. 363.

And generally the libellant, in a case of collision, must prove not only negligence on the part of the respondent, but ordinary care on his own part.

Bullock *vs.* Lamar, U. S. C. C. Georgia, May, 1848.
8 Law Reporter, 275.
Abbott on Shipping, 228, note 2.
The Shannon, cited in Abb. on Shipping, 234.
Steamboat Neptune, Olcott, 493.

In this last case, Judge Betts says:—

"The libellants are bound to prove their own con- "duct correct, both in what was done or what was "omitted to be done on board their vessel. If their "acts caused the collision, or essentially conduced "to it, they must bear the consequences; and can- "not call upon the steamer to contribute to their "satisfaction, unless it appears she was equally in "fault."

"The action is for a tort. The complaining ves- "sel must appear clear of blame, and must also

"prove fault or negligence on the part of the other,
"directly leading to the disaster."

The Hope, 1 W. Robinson, 154.

In this case it was urged that if it was in the power of one of the vessels which came into collision to have avoided it by giving way, she was bound to have done so, notwithstanding the rule of navigation. This the Court admitted to be true as a general proposition, and said:

"No vessel should unnecessarily incur the proba-
"bility of a collision by a pertinacious adherence
"to the strict rule of navigation."

"If a steam vessel should, for instance, be nearing
"another sailing vessel, and such vessel should be
"steered erroneously; if the master of the steam
"vessel should wilfully say, 'this vessel is steer-
"'ing wrong, but we will keep on our own course,'
"and a collision ensues in consequence, I should un-
"doubtedly hold that the steam vessel was to blame."

See Abbott on Shipping, 238.

The Test,—11 Jurist, 998, and 6 Harrison's Dig. 1461, holds:—"In cases of collision, it is no de-
"fence to a vessel clearly in the wrong, that the other
"vessel might by departing from the ordinary rules
"of navigation have avoided the collision, but the
"whole damage will fall upon the vessel which did
"not adopt the measures proper for her in the par-
"ticular circumstances."

The same doctrine is asserted in:—

Fashion *vs.* Ward, 6 McLean 152, and in Griswold *vs.* Sharp, 2 Cal. 17.

See also the Steamboat Rhode Island, Olcott, 505, affirmed 7 New York Leg. Obs. 38.

Turbell *vs.* Steamboat Keystone State, 9 N. Y. L. O. 289, and particularly the Steam Ferryboat Jamaica, 11 N. Y. L. O. 242, which holds that the absence of a lookout, under the circumstances of that case, was no evidence of fault or negligence; and the Court refused to apportion the loss.

The Steam Ferryboat Oneota, 11 N. Y. L. O. 353, holds "that it is the right of a vessel to beat out her "tack, and that a steamboat in company with a sail "vessel is bound to be navigated, under the expecta "tion that the latter will be so navigated."

When it is borne in mind that a steamer bears the same relation to a sail vessel, that one sail vessel having an advantage does to another sail vessel, the above decision becomes one in point, and is of great importance.

And to the same effect, and for the same reason is the case of the Steamboat Empire State, 12 N. Y. L. O. 259, which holds that a steamboat having a vessel under canvas in full view, is *prima facie* responsible for steering clear of her; and that the steamer was wrong in persisting in her course under the expectation that the sailing vessel would change hers, the latter not having given any indication of her intending to do so up to the last moment.

—But there is still another legal rule which holds the Brothers entirely at fault, and visits upon her the consequences of the collision; and that rule is that a stern vessel approaching a leading vessel is bound to avoid a collision.

Turbell *vs.* Steamboat Keystone State, 9 N. Y. L. O. 289.

Whitridge *vs.* Dill, 23 How. 448, particularly.

That the Brothers was the stern and the Huntley the leading vessel cannot be disputed.

Had the manœuvre of the Brothers been precisely what it was, and had she collided with the Huntley instead of the Huntley with her, the case of Whitridge *vs.* Dill would have been exactly in point.

RICHARD H. HUNTLEY,
Of Counsel for Appellees.

19 How. 25

11 N. Y. 236. Look out. —

2. Doc. Court Ad. Prac. 390.

2. Mm Rooms 189. —